

~~GEI. G.C.~~

Judgment
1, 1958

IN THE PRIVY COUNCIL

No. 9 of 1958

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N

EWA PERKOWSKI

Appellant

- and -

THE MAYOR COUNCILLORS and CITIZENS
OF THE CITY OF WELLINGTON

Respondents

RECORD OF PROCEEDINGS

ARNOLD FOOKS CHADWICK & CO.,
15, Bolton Street,
London, W.1.

Solicitors for the Appellant.

WRAY SMITH & CO.,
3/4, Adelaide Street,
London, W.C.2.

Solicitors for the Respondents.

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Exhibits Separate from bound Case on Appeal:

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17. Notice of Motion by Plaintiff to rescind Order of Judge in Chambers.
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IN THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN EWA PERKOWSKI of Wellington,
Widow of Antoni Witold Perkowski

Appellant

A N D THE MAYOR, COUNCILLORS AND
CITIZENS OF THE CITY OF
WELLINGTON a body corporate
duly constituted under The
Municipal Corporations Act, 1933

Respondent

10 TAKE NOTICE that this Honourable Court will be moved at the
first sittings after the expiration of fourteen days from the
service of this Notice to wit the sittings commencing on the
13th day of March 1955 by Counsel for the above-named
Appellant ON APPEAL from the whole of the Judgment of the
Supreme Court of New Zealand delivered by the Honourable Mr.
Justice Hutchison on the 17th day of November 1955 in an
action No. A218/54 in which the above-named Appellant was
plaintiff and the above-named Respondent was defendant which
Judgment dismissed the Motion of the plaintiff (Appellant)
20 for judgment and allowing the Motion of the defendant (Res-
pondent) for judgment gave judgment for the defendant
(Respondent) accordingly.

DATED at Wellington this fourteenth day of December 1955.

D.J. RIDDIFORD

Solicitor for Appellant.

To the Respondent (Defendant)
and his Solicitor, M.J. Earle Esq.,
City Solicitor, Wellington.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
(WELLINGTON REGISTRY)

No. A218/54

BETWEEN EWA PERKOWSKI of Wellington,
Widow of ANTONI WITOLD
PERKOWSKI deceased
Plaintiff

10

A N D HER MAJESTY'S ATTORNEY-GENERAL
(sued in respect of the Marine
Department) AND THE MAYOR
COUNCILLORS AND CITIZENS OF THE
CITY OF WELLINGTON, a Body Cor-
porate duly constituted under
the Municipal Corporations Act,
1933
Defendants

AMENDED STATEMENT OF CLAIM

Monday, the 28th day of February 1955.

The Plaintiff by her Solicitor says :-

- 20 1. ON 9th January, 1954, the Plaintiff's husband ANTONI
WITOLD PERKOWSKI, deceased (hereinafter called "the deceased")
went to Worser Bay, Wellington, to bathe in Wellington Harbour.
2. AT or about 2 p.m. the deceased dived from the diving board
at Worser Bay aforesaid into shallow water and suffered
injuries from which he died at Wellington Hospital on 10th
January, 1954.
3. IT was low tide at the time of the said accident, although
the deceased was unaware of the fact.
4. THE platform from which the said diving board projected
30 the concrete supports of the said platform and the said diving
board were the property of the Marine Department.
5. THE access-way or approach to the said diving board was by
means of two duck-walks the first of which said duck-walks runs
between two rocks the said rocks being the property of the

Mayor, Councillors and Citizens of the City of Wellington (hereinafter referred to as "the Defendant Corporation") and the second of the said duck-walks connects the further rock to the said platform; and the whole of the said access-way is mainly if not entirely the property of the Defendant Corporation.

6. THE said diving board was erected by the Defendant Corporation in substitution for a previous diving board erected by the Worsler Bay Amateur Swimming and Life Saving Club which had been
10 broken.

7. THE said platform, the said access-way and the said diving board constituted in substance and in fact a single structure.

8. THE danger to persons unaware of the shallowness of the water at the end of the said diving board using the said diving board at low tide was well known to the Defendants but there was no notice warning the public of the said danger and no pole or gauge at or near the said diving board graduated to show the depth of the water at different times of the day.

9. THE Defendants well knew that the said diving board was
20 used by the general public.

10. THE said diving board was a trap for the following reasons:

- (a) At low tide the sea completely surrounds the said concrete supports on which the said platform rests.
- (b) The said diving board was long and extended to a point where it could be assumed in the absence of warning that the water was deep enough for diving even at low tide although in fact it was deceptively shallow.

11. THE Marine Department either expressly or impliedly gave a licence to the Defendant Corporation to erect and maintain the
30 said diving board and expressly or impliedly gave a licence to the general public to use the said diving board.

12. THE Defendant Corporation either expressly or impliedly gave a licence to the general public to use the said diving board.

13. THE Defendants were negligent and particulars of their negligence are as follows :-

- (a) Expressly or impliedly giving a licence to the general public to use a diving board which they knew or ought to have known to be dangerous.
- 10 (b) Failing to erect and/or maintain a notice which gave warning of the said danger.
- (c) Failing to erect and/or maintain a pole or gauge to show the depth of the water at different times of the day.

14. AS A FURTHER AND ALTERNATIVE CAUSE OF ACTION the Plaintiff repeats the allegations in paragraphs 1 to 13 hereof and says that the Defendant Corporation failed in its duty of care to the persons using the said diving board in not instructing its officers or servants to warn persons of the danger of diving from the said diving board at low tide.

20 15. NOTICE of intention of the Plaintiff to commence proceedings against Her Majesty the Queen was served on Her Majesty's Attorney-General on the 16th day of July, 1954.

16. NOTICE of intention of the Plaintiff to commence proceedings against the Mayor, Councillors and Citizens of the City of Wellington was posted to the City Solicitor, Wellington on the 3rd day of November, 1954, and service thereof was duly acknowledged by a letter of the City Solicitor dated the 5th day of November, 1954.

WHEREFORE the Plaintiff claims against the Defendants jointly and severally or in the alternative:-

(a) BY WAY OF SPECIAL DAMAGES

Funeral Expenses	£ 38.15. 0
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(b) BY WAY OF GENERAL DAMAGES £6,000. 0. 0

(c) Costs of and incidental to these proceedings.

This Amended Statement of Claim is filed by Daniel Johnston Riddiford of Wellington, Solicitor, whose address for service is at the offices of Messieurs O. & R. BEERE & RIDDIFORD, 174 Lambton Quay, Wellington.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

No. A218/54

BETWEEN EWA PERKOWSKI of Wellington,
 Widow of ANTONI WITOLD
PERKOWSKI, deceased

Plaintiff

A N D HER MAJESTY'S ATTORNEY-GENERAL
 (sued in respect of the Marine
 Department) AND THE MAYOR
COUNCILLORS AND CITIZENS OF THE
CITY OF WELLINGTON, a body
 corporate duly constituted under
 The Municipal Corporations Act,
 1933

Defendants

10

STATEMENT OF DEFENCE

Monday, the 7th day of March 1955.

The Defendant Corporation by its Solicitor Malcolm Joseph

20 Earle, says:-

1. It admits the allegations contained in paragraphs 1 and
 2 of the Amended Statement of Claim although it has no direct
 knowledge of these matters.

2. In reply to paragraph 3 of the Amended Statement of Claim
 it admits that the tide was low at or about the time of the
 accident described in the Amended Statement of Claim but it
 denies that Antoni Witold Perkowski was unaware of the state
 of the tide.

3. The allegations contained in paragraph 4 of the Amended
 30 Statment of Claim relate to the first-named Defendant and the
 Defendant Corporation makes no reply thereto.

4. It denies each and every allegation contained in paragraph
 5 of the Amended Statement of Claim.

5. In reply to paragraph 6 of the Amended Statement of Claim
 the Defendant Corporation admits that in response to a request
 made in 1941 to the Reserves Committee of the Wellington City

Council by the Worsser Bay Amateur Swimming and Life Saving Club (Incorporated) for a new wooden diving plank to be installed on the Club's concrete pier at Worsser Bay, the Wellington City Council for and on behalf of and as agent for the said Club erected a diving plank on the pier aforesaid in replacement of a previous diving plank erected by the Club which had been broken.

6. It denies each and every allegation contained in paragraphs 7 to 10 inclusive of the Amended Statement of Claim.

7. The allegations contained in paragraph 11 of the Amended Statement of Claim relate to the first-named Defendant and the Defendant Corporation makes no reply thereto.

8. It denies each and every allegation contained in paragraph 12 of the Amended Statement of Claim.

9. It denies each and every allegation contained in paragraph 13 of the Amended Statement of Claim in so far as these relate to the Defendant Corporation.

10. It denies each and every allegation contained in paragraph 14 of the Amended Statement of Claim.

11. The allegations contained in paragraph 15 of the Amended Statement of Claim relate to the first-named Defendant and the Defendant Corporation makes no reply thereto.

12. It admits the allegations contained in paragraph 16 of the Amended Statement of Claim.

AND FOR A FURTHER AND ALTERNATIVE DEFENCE the Defendant Corporation says :-

13. It repeats the admissions denials and allegations contained in paragraphs 1 to 12 hereof.

14. The said Antoni Witold Perkowski was a frequent visitor to Worsser Bay for the purposes of swimming and diving.

30 15. The said Antoni Witold Perkowski when proceeding towards

the water at or about 2 p.m. on the 9th day of January 1954 knew or ought to have known from his own observations that the tide was low.

16. To one proceeding to the diving plank at or about low tide the shallowness of the water in his vicinity is continuously obvious while he proceeds along the duck-walks to the platform and while he is on the platform itself.

17. In particular at or about low tide the shallowness of the water under the diving plank is obvious to one who proceeds
10 along the diving plank or who stands at the end of the said plank preparatory to diving.

18. The death of the said Antoni Witold Perkowski was due entirely to his own negligence.

19. Details of such negligence on the part of the said Antoni Witold Perkowski are as follows :-

- (a) He failed to ascertain the depth of the water under the said diving plank before he dived therefrom.
- (b) He failed to look down into the said water before he dived.
- 20 (c) He failed to notice that children and other persons were wading or standing in shallow water near the said plank or failed to take warning from that fact that the said water was shallow.
- (d) Generally he failed to take reasonable care for his own safety.
- (e) Being aware that the tide was low at the time and that the water under the diving plank and its approaches was shallow he disregarded these facts and dived off the said plank.

30 This Statement of Defence is filed by Malcolm Joseph Earle, City Solicitor, Solicitor for the Defendant Corporation, whose address for service is at the City Solicitor's Office, Central Library Building, Mercer Street, Wellington.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
(WELLINGTON REGISTRY)

No. A218/54

BETWEEN EWA PERKOWSKI of Wellington,
Widow of ANTONI WITOLD PERKOWSKI
deceased

Plaintiff

AND HER MAJESTY'S ATTORNEY-GENERAL
(sued in respect of the Marine
Department) AND THE MAYOR,
COUNCILLORS AND CITIZENS OF THE
CITY OF WELLINGTON a body cor-
porate duly constituted under
The Municipal Corporations Act,
1933

Defendants

10

DISCONTINUANCE OF ACTION AGAINST HER MAJESTY'S
ATTORNEY-GENERAL

The Plaintiff hereby discontinues her action against Her
20 Majesty's Attorney-General being the first defendant named
in this action.

DATED at Wellington this 1st day of July, 1955.

Solicitor for the Plaintiff.

TO: The Registrar,
The Supreme Court,
Wellington.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN: EWA PERKOWSKI of Wellington,
Widow of ANTONI WITOLD
PERKOWSKI, deceased

Plaintiff

AND: HER MAJESTY'S ATTORNEY-GENERAL
(sued in respect of the Marine
Department)

10

AND: THE MAYOR COUNCILLORS AND
CITIZENS OF THE CITY OF WELL-
INGTON a body corporate duly
constituted under the Municipal
Corporations Act, 1953

Defendants

Hearing: Wednesday, August 17, 1955

Counsel: Riddiford for Plaintiff
A.D. Thompson for Defendants

20

NOTES OF EVIDENCE TAKEN BEFORE THE HON. MR.
JUSTICE HUTCHISON

RIDDIFORD OPENS AND CALLS:

DOUGLAS WILLIAM KEITH: I am a Technical Assistant in
the Fisheries Laboratory, Wellington. On 4th August 1954
I visited Worser Bay in company with two others. The weather
was clear, fine, a slight swell on the sea, but calm otherwise.
It was fair, slightly cloudy.

30

Would you describe what measurements you made? Mr. Burt
came out on the end of the diving board, Mr. Irvine waded into
the water with a measuring cord. That measuring cord was
attached to the end of a pole which Mr. Burke held down from
the end of the diving board towards the surface of the water.
At various distances from the board the depth was measured
with another measuring rod held vertically into the water and
placed on the sea bed; these depths were measured by me as Mr.
Irvine held the cord against the graduated marks on the
measuring stick.

I produce some photographs and a plan. There are two sets of photographs. (5 PHOTOGRAPHS EXHIBIT A.) What method did you employ for measuring the depths in circles beyond the board? By using the rod which Mr. Burke was holding down as a centre point where the cord attached to it was knotted every yard. We worked round on a circumference with a radius first of 12 feet, then 15 feet, then 18 feet then 21 feet, and in each of these positions and the various distances on the circumference, the measurements were taken.

10 There'd be no question of their accuracy? No, they couldn't be more than an inch or two out. We started at 2.15, the weather was quite clear during the time. Did you make a plan of your measurements? I did. I have it here, but only one copy. (EXHIBIT B.) A plan showing contours of water depths. At 12 feet what was the depth? It went from 2 feet 8 inches immediately opposite the end of the diving board, on shore side 2 feet 2 inches, on sea side 2 feet 7 inches. At 15 feet, starting from seaward side, 2 feet 9 inches, off end of diving board 2 feet 8 inches, then 2 feet 1 inch in shore.

20 18 feet, 2 feet 9 inches, 2 feet 8 inches off diving board, 2 feet right on inshore. 21 feet, 2 feet 8 inches, 2 feet 11 inches at 45 degrees, 2 feet 8 inches again off diving board, 2 feet 1 inch on inshore side. What was actual depth at central point? That can only be gathered from photographs. It was not actually measured. What was the height of the top of the board from the water? 7 feet 2 inches.

THOMPSON XXD:

I suppose this time that you took these measurements was approximately low tide? Yes, as near as one could get to the previous conditions. And the photographs were taken by whom?

30 I took them. Just to give the jury an idea, Mr. Irvine is a fairly tall man? He would be about 5 feet 10 inches, not as tall as I am.

The diving board doesn't project out seaward, does it? More or less at right angles? It's more or less parallel to the shore. The shore of the main bay? Yes.

As a result of these measurements, would you say that the whole of that area was more or less of a flat surface? Yes, it appears so from the measurements. Were you in the water yourself? Yes, walking around. Walking out to the rocks and underneath the diving platform? I didn't, no, I just walked far enough to take photographs and take measurements. You didn't follow round the
10 circle then? No, I didn't follow round.

EWA PERKOWSKI: I am a widow living at 17 Brooklyn Road, Wellington. I am the widow of the deceased Antoni Witold Perkowski. Would you tell the Court what happened on Saturday, 9th January, 1954? (COURT: Do you require this evidence? Riddiford: There are certain details.)

Would you tell the jury, explain to them where you were sitting at the time? Where were you and Mrs. Goot and your small son sitting? More or less here (indicates from map). My husband and I and Mrs. Goot and my little boy were sitting on
20 the edge of the grass (indicates to west of Life-Saving Club). After lunch my husband and the little boy went down towards the sea, and this is the route which they followed: We went along the rocks to the east to the spring-board. Where was the little boy standing? Closer to the shore.

Where was the little boy standing? In the water, close to the shore ... Was he or was he not standing level with the spring-board? No, he was nearer to me. Did you and your husband often go to Worser Bay to swim? We went in the summer, Saturday or Sunday if it was nice weather, in the holidays. Did
30 your husband go alone? No, we always went the three of us. How many times has your husband dived from that board? I couldn't say how many times, several times in 1953 and several times in 1954, two or three times before this accident. I don't think you dive yourself, do you? No.

What was your husband's health like? Very very good, he was very strong. When did you come to New Zealand? I think it was in 1944 that we first arrived. We both came together. In what year were you married? We came in on 1st November, and we were married the next year in March, that was 1944. When was your husband born? 1899 in Warsaw. How old is your boy? In October he'll be 10 years old.

COURT: How old are you? I was born in 1900. So you're 54 now? Yes, 55 in December.

10 Did your husband bathe in the sea before you came to New Zealand? I couldn't say. It is a long way to the Baltic Sea in the north - a much longer way than in Wellington. We were in the centre of Poland. I did not know my husband before. I was married before, and widowed. My husband had also been married before. I am not certain about my husband's life before because I didn't live with him.

COURT: Has your husband any children? Yes, a daughter, grown up and married. I have a daughter, too, she is not married, but is grown up and not dependent on me or my husband.

20 Now when you were living with your husband in Wellington, did he bring home all his salary? Yes, we had together a little box. He was employed in the Inland Revenue Department. Were you working yourself? Yes, part-time in the State Advances Corporation.

COURT: You were both clerks? Yes.

30 What were your earnings? £350 a year, more or less. I'm now working full time. How much did it cost to feed the family at that time? The three of us, more or less £7 a week, £6 or £7 a week. How much of that was spent on food for your husband? The boy had twice pneumonia, he was a delicate child. I spent about £2 a week on my husband.

COURT: It cost you £7 a week just for food? Yes, just for food.

Did your husband do much work round the house? He has done

everything, gardening; we live in a very old, condemned house. In the beginning of the holidays in 1954 he did a lot of work in the house. Everything he has done, the verandah, he was very hard-working in repairing the house. It was condemned by the City Council years ago.

How long have you been in your present house? Since May 1948. Who paid the rent? My husband. What were your husband's expenses? He was a very light smoker, he didn't smoke in the office, only at home. He had no other expenses, he was not a gambler or a drinker. Did he or did he not send parcels to Poland? Yes, he has an old mother, over 80 years old. Everyone in Poland says now, he used to send parcels to his mother. What would the cost of that be? We worked out once that the parcels in a year were between £30 and £35.

Did your husband have any other occupation? He used to do for Mr. Barraud colouring for the photographs. His hobby was painting. For John Barraud Studios. And those are his earnings over a period of time? Yes, he used to collect money from Mr. Barraud. In under 2 years he earned £177.2.2d. for colouring these photographs, this is from accountants to John Barraud.

When you went to Worsar Bay, I don't think you bathed yourself? No, I didn't, I was sunburnt. Had your husband got a good knowledge of English? He spoke a little. Did he mix much with people in public places? No, he did not have good English, and he was very shy to speak. He could read it very well, but he was too shy to speak it. Did he or did he not speak to other people at Worsar Bay? No, he didn't speak to anyone. He just said I'm going to bathe, that was to me.

What knowledge did you have of tides? I didn't know anything about tides. A man from the Surf Club went with us to the Free Ambulance. He asked me what had happened, I didn't

even know, he told me it was the tide out. Was your husband an educated man? Yes, he was a lawyer in the High Tribunal in Warsaw. (Funeral account put in by consent.)

XXD THOMPSON:

Mrs. Perkowski, on this Saturday, do you remember about what time you arrived at the beach? About 1.00, we left about 9.45, and came to the beach about 1.00. And then you went and sat on the grass? Yes. You were much nearer the Surf Club than you were to the Bathing Shed? No, nearer the bathing shed. I
 10 could show it more easily tomorrow, it was nearer the bathing shed. You sat there and had lunch? Yes. So that you were on the beach for about an hour? Yes, about an hour altogether. Something after 2.00 my husband set off. Mrs. Goot accompanied you out? Yes. She was an old friend of yours? Yes, I knew her in Poland.

Did you and Mrs. Goot usually go swimming too when you were out there? Not always. You have been in swimming there, on other occasions? Yes, but I'm not a swimmer. You don't swim? No.

COURT: You mean you bathe? Yes.

20 You're careful not to go out of your depth? Yes. You find you can go quite a long way out at Worser Bay before you're out of your depth? Yes, there is a sandy part. I never went in the deep water, I was frightened. You would go about to your waist line? Yes. Did you ever notice out there that there was less sand than usual? No, I didn't. Sometimes a narrow bit, sometimes more? No. Did you notice that you could see more of the rocks sometimes? I was not so much interested in the water, I was more interested in the sun. Our little boy, his father used to take him into the water. Sometimes when they played, was the strip of sand
 30 smaller?

COURT: You must have known the sea had tides? I didn't know before. Where were you educated? In Poland. A technical education? No, after matriculation. University? Not under the grade of university. Two years trade and commerce. A commercial college, economics? Yes. Book-keeping, typewriting, shorthand. You were at a secondary school how many years before matriculation? Eight years. What age would a young person matriculate in Poland? About 18. So you were at school until you were 18? Yes. And you had two years after that at college? Yes. I'd be surprised if you didn't learn something about tides? Yes, we did learn, but I had a hard time during the war. I am absent-minded, I did not know. But taking geography in any country in the world, I'd be very surprised if anyone did not know, Mr. Riddiford, that there were tides. A. I would like to say I did not know about the danger of the tide out. In my country the level of the tide is always the same. I did not know about the danger.

Looking from where you were sitting, you had a good view of the spring-board? Yes. I suppose you noticed the diving board on other occasions when you were out there? Yes. Did you ever notice there was more of a gap between the diving board and the water on some occasions? I never noticed. I was not interested in diving myself. You told us you went out there on fine Saturdays and Sundays, several times in 1953, several times in 1954. Were you out before that? No, never. We used to go to Oriental Bay. Now at Oriental Bay, I think you would find some days when you went there practically no sand? There was always sand. But sometimes the water would be fairly close to you? Yes, perhaps, several times, but I never noticed.

You have told us, Mrs. Perkowski, that Mr. Perkowski little son, went in to bathe. They would go along and get changed in the bathing shed? Yes. They came back before they went in swimming. I was sunburnt, and my husband was going to rub something on my shoulders. Had there been any discussion about swimming before they went in? No, my husband said he would take the little boy for a walk. A walk? Yes. Then they went down and entered

the water together? Yes.

You see this big rock here (indicates)? Yes. Did they walk out to that rock? Yes, together. Then Mr. Perkowski climbed up on the rock, the boy stayed in the water? Yes. The rock is nearer to the spring board. The boy went into the water and my husband to the spring-board. Did the boy follow or go out to his father? He was a big distance from his father. That wouldn't be very far from that big rock to where the diving board actually was? At this time the diving board she was a long distance. And
10 the boy didn't walk out at all? No. Did you notice how far up the water was on the little boy? I couldn't say. I watched rather my husband when he was going to dive. Did you notice where the water came to on your husband at the time he was climbing up on the rock? It is hard to say, it was a distance from where we were sitting. They went from one rock to the other rock, I did not see. Eventually he climbed up to the spring-board.

In other matters, have you said you did not become concerned, you thought he was only having a game, he was only a short distance away? Yes, I told Mrs. Goot not to worry, my husband would be just
20 showing Johnny how well he could dive. But wasn't Johnny not very far away from him? I'm not able to say here if Johnny was far away, because I can't visualise where Johnny would be here, or where we were sitting. Much closer to the time when this accident happened, you made some statement about how it occurred. Do you remember saying that John was only a short distance away from his father? I couldn't tell you, I could only show you the place. At the police station, I was very distressed, I couldn't tell the constable the distance, I couldn't explain it, I might have said a short distance.

While you were sitting on the beach having lunch, did you
30 notice any other children in the water? Yes. Were they bathing out near the end of the diving board? It's hard for me to say now, it's nearly two years ago that it happened. As to Mr. Perkowski's colouring photographs, this was all work for this one firm, with Mr. Barraud? Yes. What type of photographs? Wedding photographs?

The last ones were on 17th September, 1953? I couldn't tell you. He hadn't done any just prior to Christmas, over holiday season? The work was a bit of a strain, he used to do it after working hours, and John was home for the holidays. He liked to have a break over the Christmas holidays and then start again. You know Mr. Barraud gave up business in Wellington? I didn't know. He had no contacts with any other firm? Well a month after he died I received a telegram from Spencer Digbys offering work.

10 You told us you worked for State Advances, part-time, and now full-time? Yes. Would you tell me, Mrs. Perkowski, what your salary is now? £17.11.0 a fortnight, nett. You know about the returns you make of income, social security? Yes, I do it. My husband used to do it. I paid last year, I don't remember how much.

Your husband was a lawyer in Poland? Yes. And well read, well educated? Yes. You've no idea how long he was at university? He was one of the officers concerned with the court. He didn't practise as a lawyer, he was qualified as a lawyer, but he worked for the High Tribunal. Was Mr. Perkowski fond of swimming? Yes, 20 very fond of swimming. He liked cold showers in the winter, too. He did a lot of swimming at Christmas and week-ends sometimes. You have a big section with your house? Yes, a big section.

RXD RIDDIFORD:

Where did your husband live in Poland? In Warsaw before coming to New Zealand, and in Ripien. South or north of Warsaw? Rather more north of Warsaw. Can you make any estimate of the number of times your husband dived from Worser Bay? Several times, three or four times in 1953, twice in 1954, I think, over Christmas and in January before.

KARZIMIERZ ANTONI WODZICKI: I live at 37 Conini Road, Hataitai, and am a scientist. I am the former Consul-General of Poland, and a professor of the University of Poland. I am now the Officer in Charge of the Animal Section of the D.S.I.R. Would you tell the Court where the only seaside places in Poland are? A stretch of sea about 50 or 60 miles long north of the port of Gdynia, in the north of the country. When would they be visited? Being so far north, they are visited only during the summer time, during August.

10 COURT: That is the northern end of what used to be called the Polish corridor? The corridor is actually below, this is on the north part of Poland. The corridor joins that portion of Poland to the bulk of Poland? Yes, sir.

How far would Gdynia be from Warsaw? 350 or 380 miles, a journey of about 16 hours from Krakow, and from Warsaw about 10 or 11 hours. How many times did you go? Actually not so many people visited it. I have been twice only during 19, 20 years. Accommodation is difficult. This would probably be the average.

20 What is a feature of the Baltic Sea? First of all it's a land-locked sea, with a very low content of salt, compared with Northern Sea. The whole coast is enclosed, but the most important feature is the very small tides over there, which are, I am sure, smaller than the Mediterranean. They are lower, only a few inches. The tides are more noticeable in the Mediterranean.

So far as bathing is concerned, what attention would bathers pay to the tides? No attention whatever. What opportunities would Poles have of bathing in any other sea? Very few, because of distance to other seas, and furthermore the expense and difficulties of obtaining passports, visas to travel to other seas. A
30 very small percentage of the population had an opportunity to go to seaside resorts other than the Polish ones. How many Poles are there in New Zealand? I would estimate it as about 2,000 Poles, people of Polish nationality in New Zealand, and more than half in Wellington

and vicinity. There are no statistics, but on an assembly on National Day, 2,000 people.

XXD THOMPSON:

You, of course, were aware of tides yourself. You know about tides? Yes. The people of the educational standard reached by Mr. Perkowski would have heard about tides? In what way do you mean? Isn't it part of the curriculum of the educational system? Yes. You yourself say there were specially low tides in the Baltic? I would say that there was neither high nor low tide. But you
10 would be aware that in other parts the tide rose and fell a great deal more? I would put it this way, that in my travels I have bathed in several seas, I've bathed in France, Italy and other places. You've read about tidal bores in rivers? Yes. Actually I learned from reading about it in other countries, but I don't remember reading of such things when I was in Poland.

Do you know when Mr. Perkowski came to this country what places he visited on the way? Vaguely. After leaving the labour camp he stayed at Persia where all the people were released, he spent a year, a year and a half there. (OBJECTION - DISALLOWED.) He
20 didn't pass through other countries, he came substantially direct, from Russia to Persia, and then direct to New Zealand. Mrs. Perkowski told us that he'd been out here since the end of 1944? Yes.

NORA GOOT: I live in Wellington, and I am employed in the Film Library. How long have you been in New Zealand? Four years. Mrs. Perkowski I knew from Poland. And you have known her since she came to New Zealand? Yes. Could you tell the jury what happened on 9th January? I met the Perkowskis in town, we went by tram to Worser Bay. We arrived there about 1.00, we had our lunch, we had been in very good spirits, and after lunch, Mr. Perkowski

said he would like to go for a swim with his little son. I didn't watch them because I had been talking to Mrs. Perkowski. But after a certain time I asked Mrs. Perkowski where is your husband and son. Just at that moment, she said, have a look, he will now jump from the spring board, and I just saw Mr. Perkowski jump straight into the water. Did you see where little Johnny was at the time? As far as I remember he wasn't far in the sea, as Mrs. Perkowski wouldn't let him go far away. Do you remember saying anything to Mrs. Perkowski? After Mr. Perkowski had dived, I said to her, "Why doesn't he come out?" Just after that, did you see a man? Yes, I saw a man sitting on the shore, and at the same moment as I said that to Mrs. Perkowski he ran in and rescued him, a young man, and they brought Mr. Perkowski on the shore. I came nearer, I was terribly shocked, I took little Johnny. Mrs. Perkowski went to the hospital in the ambulance, and I took the little boy to my place.

Do you remember going with Mr. and Mrs. Perkowski often to Worsser Bay? Yes, I had been three times with them during the holidays. Did you ever see Mr. Perkowski dive before? No, but I saw him swimming. Did you swim on that day? I didn't. Were there many people on the beach that day? As far as I remember, not very many. What sort of a day was it? A very warm day, but not sunny. The sun came out from time to time. Do you or do you not remember seeing people standing in the water round about? I didn't see them. Did you know of there being any danger in the diving board? No, I was not aware of any danger. Do you know anything of the effect of tides at Worsser Bay? No. What sort of a man was Mr. Perkowski? A very quiet type, he wasn't the kind of man to take risks. Did you have any reason for thinking so on that particular day? No.

30 XXD THOMPSON:

Mrs. Goot, where you were sitting on the grass, did you have a good view down on the beach? Yes. And of the diving platform

and the board? Yes. You didn't actually watch them go down and enter the water? No. Did you ask Mrs. Perkowski to point out where they were? Yes. Did she point out where the boy was? He was on the edge of the water, not far from us. Did you see any other little children in the water? No, I didn't. If you just looked, he was the only child there? It wasn't such a very good day, there weren't many people. Well why did Mrs. Perkowski point out the boy when he was the only one there? I was only interested in Mr. Perkowski and his son. So that the merest glance would have enabled you to see the boy and Mr. Perkowski without anyone pointing them out to you? Yes. Just as you turned round to look, Mr. Perkowski was on the board? He was just jumping. Going in head first? Yes. How did he have his arm? He jumped head first, his hands down. He didn't have his arms up above his head? No, he didn't.

Now you knew Mrs. Perkowski in Poland? Yes. Not very well. I was more friendly with her here now in New Zealand. You've known Mr. Perkowski only since you came to New Zealand? Yes. I understand he was a bit of an artist, a painter? Yes. Did he paint pictures as well as do photographs? I saw some pictures of his. As an artist, would you say that he would have a knowledge of colour? Yes. An eye for detail? It's hard to say really. But he'd be apt to notice, to observe things? Yes. Was there any discussion about swimming or diving before they went down to the water? No. Do you dive yourself? No. I swim quite often. At Worsers Bay? Yes, three times with the Perkowskis. Did you ever notice that the beach doesn't get deep very quickly, that it's shallow a fair way out? No. Did you notice you had to go out a long way before you could swim? Yes, we had to sometimes. Sometimes? Yes. Did you ever swim out beyond where the platform was? No, it's very deep there. You didn't swim up that end at all? No. I suppose you've watched people diving quite often? Yes, but I wasn't very much interested. But as a swimmer you know that when you go in headfirst, it takes a little time to come up again? I don't know really, I've never tried it myself. Even when I was very young I

was not diving.

I suppose Mr. Perkowski was in the water with the little boy on other occasions, playing and having fun with the boy? Yes. Sometimes he'd look after him and play about with him while you were in the water? Yes, sometimes I was sitting and Mrs. Perkowski would go in, sometimes the other way. But when he took the boy in, he would keep an eye on him, look after him? I suppose so.

CHRISTOPHER WYNN BILLINGS: I am a Clerk in the National Airways. I am 18 and a member of the Worser Bay Surf Club. I
 10 have been able to swim for about 11 years, and a life-saver for about 5 years. What were you doing at about 2.00 on that day? Sitting on the beach with some of the other chaps. Were they all members of the Worser Bay Club? The majority of them were. Did a member direct your attention to anything? Yes he directed my attention to something floating underneath the diving-board. I ran out to see what it was and found it was an elderly gentleman who had evidently dived off the board. Did you see him go out? I saw him walk along the water's edge. What did you do when you saw the body? I ran straight down to the water, and someone got hold of him before
 20 me. We took him under the arms and with some assistance lifted him onto the beach. How high was the water? I don't know exactly but it didn't come to my knees. (Indicates below his knees, some inches below.) Was it any deeper than that just under the diving board? I don't know, I didn't go, but at that time I should think the water would be just about my knees at my knees there. How high would the board be at that time? Low tide? I'd say about 10 feet.

At low tide, does the water come round the concrete supports of the platform? Yes, not very much around the first pile, but about
 30 2 feet round the second pile. How far does it come? About 6 or 7 yards towards the shore. Does it get as far as the seaweed?

I think it just wets the seaweed at low tide. How far from the Club House would the bed of seaweed be? I should say about 10 yards, at an angle. There are two rocks in between the diving board and the seaweed. Were there many people bathing at that time? No. A more popular time would be during week-ends. At what hour of the day? Usually after lunch, after 2.00. What day of the week was it? I'm not sure. It was holidays, yes, it was a Saturday. Counsel agrees that 9th January 1954 was a Saturday.

10 Do you remember what the weather was like? A day something like to-day, overcast with no wind, and the sun coming hazily through.

With regard to the water, would it be possible for a stranger immediately to realise it was exceptionally shallow? Yes, I should say so. If he had been there all day and had seen both tides, and then been there at low tide, he wouldn't have dived. Was there any warning notice near to the board, warning people not to dive at low tide? No. Was there a pole there at any time? No, not that I know of. There used to be an old pole up the beach which the Army put there, but they took that down. That was about 5 or 6 yards away. They had a barbed wire entanglement right round the beach, 20 and it was used for that. Was that graduated or not? No. Would the seaweed on it be an indication of whether it was high water or not? Yes, I should think so. The seaweed wouldn't have grown there if the water hadn't reached it at some time. Did the Club remove this pole? No, I don't know who took it down.

Does the Club have beach patrols? Yes. What do these patrols do when people go at low tide to the diving board? They call them down from the diving board. Is there any great variation with the tides, is low tide any lower at some seasons of the year? We have spring tides, which come in very far, and go out an exception- 30 ally long way. This day was an unusual tide. We had spring tide four days before this, and it doesn't usually go out so far.

XXD THOMPSON:

You told us that if a man had seen the conditions there both at high and low tide he wouldn't dive at low tide. If a man had been out to this beach on a number of occasions, and had dived off the board before, would you expect him to dive there at low tide? No. What have you to say about the conditions that one would pass through on the way to reach the platform? You walk from the beach through about 6 inches of water, when climbing up on the board through about 9". The sand doesn't graduate very far up at all.

10 Also on the way he passes alongside some rocks, on the way out to the platform? Yes, alongside. At low tide, could you describe the condition of those rocks? They are further out of the water, there's no seaweed on them, no sand. Is there any difference in the colour at high and low levels? It's lighter in colour, the portion that's normally dry. Any shell-fish or mussels attached? On the bottom part of the rocks, yes. At low tide you could see them? Yes, even at low tide they are covered by a little water.

On the platform itself at low tide, you look down, can you see the bottom? Yes. Is the bottom sandy? In the middle of the platform, protruding out from underneath, there are a few rocks. Otherwise it's sandy. (Indicates from map.) But you can see the bottom as you walk along? Yes, at low tide. On the diving board itself you see the bottom quite clearly? Yes. At low tide, the water would be a long way down from the board? Yes. Do you think you would have to go to the beach very often to realise what the conditions were? No, I don't think so. At high tide, off the board, you wouldn't touch the bottom, but at low tide. You'd realise where the bottom was even if you'd dived at high tide? Oh yes.

30 You said you noticed this man going along to enter the water? Yes, he had a small boy with him. Did you see them entering the water? Yes, but they weren't anywhere near the diving board at that stage. They went more or less straight. We were sitting on the grass on the left-hand side of the Surf Club. At the time I glanced along, he was walking on my left, at an angle towards the board, but at

that time a few club members came along, and I was talking to them, and not paying particular interest. You'd been for a swim yourself that morning, a training swim? Yes. And were just having a rest? Yes. Did you notice any children playing around that morning? There might have been, I didn't notice particularly. I think the man and the boy were the only ones in the water at that time. There were people on the beach.

If you had realised this man was going towards the diving-board would you have stopped him? At low tide I definitely would.
 10 Do people quite often walk out and have a look round? Yes, quite often at low tide people walk to the board and take a look at the water. When you realised that someone had dived off the board - taking a hypothetical case, would you expect anyone walking out there, making his way over to the platform. (OBJECTION)

As to the beach itself, when the tide is high, does it approach very closely to the grass? There's a strip of sand in between grass and water, it varies quite a lot, round about 10 yards of sand. At low tide, what width of sand between the grass and the water's edge? About 25 yards. The beach shelves very gradually?
 20 Yes. You'd have to go out a fair distance before it's deep enough to swim? At high tide about 5 or 6 yards only, but quite a distance at low tide. And you could continue to go quite a distance before getting out of your depth? Yes.

RXD RIDDIFORD:

You told my learned friend that you could see the bottom from the diving board. Would it be possible to say how deep the water was? At low tide, if you were standing on the board you'd know it was very shallow, you wouldn't know how deep it was. If you'd walked from the beach to the diving-board you would know it's
 30 depth, but not if you'd walked along the duck walks. You'd still know it was pretty shallow. When looking at water from a height, would experience assist you in knowing the depth? No. How long

was the diving board, what length is it? Approximately 12 feet.

RXD THOMPSON:

The diving board doesn't project for the whole of its length?

No. Part of it is embedded in the concrete of the steps, and another bit protrudes.

COURT: When you were down at the board, where is the seaweed in relation to the rocks? (Witness indicates.)

Those are some photos which another witness took. There's one, marked A.3. What are those things on the concrete piles, are they mussels? Yes. And the next one, is that the same? Yes. It shows the same, but from the other side? Yes. What did you tell us was the difference between high tide and low tide, on an average? Round about 4 feet, the drop. Under the diving board at high tide, there'd be 6 feet of water, you'd dive into 6 feet of water. In low tide, it's up to your knees, a difference of about 4 feet. Was the gentleman showing some injury to his head when you got him out of the water? Yes his head was all soft and his neck swollen. You couldn't say whether he struck sand or rock? No. Have you ever heard of an accident like this before at Worser Bay? No.

JEFFREY OWEN HILL: I am in the Inland Revenue Department.

Was Mr. Perkowski employed there? Yes, I was the head of his department. What were his earnings at the time of his death? £583 a year. When would he have retired? The probable date was May, 1964, when he reached the age of 65. Would he have had any increase in salary, apart from general wage increases? I shouldn't think so.

He had a good knowledge of English, or not? Well he appeared to be able to read it all right, but had difficulty in speaking it. Did he talk much to people in the office? Very very little. He would read a book or a newspaper, and might ask for work. He would take a long time to explain what he was after. He rarely spoke ordinarily in conversation in the office at all. Have you any other comments to make? None that I know of. I have a copy of a report we made on him in 1953; it was just in relation to his speech, to his knowledge of English.

10

XXD THOMPSON:

Were you aware that Mr. Perkowski was an educated man in his own country? Yes. Attached to the Courts? I believe so. He read a lot, you say? I couldn't answer that. I only knew him in the office.

20

WILLIAM HOGARTH GERRY: I live in Wellington and am a retired civil servant. I am president of the Worser Bay Life Saving Club, and have been for many years. Do you remember when the platform came to be erected? The earlier one, I went overseas in the first war, and when I came back in 1918 a platform was there on the rocks. We considered that was dangerous for swimmers in the Bay, we found that by having the board there, I don't know who it was erected by, that it was dangerous, and we applied to the Harbour Board for permission to extend the old board, and erect a new board. Our reason for that was on account of diving off the rocks, there were two submerged rocks, and in building the new and enlarged platform, we put the three 600 gallon tanks, $1\frac{1}{2}$ at each side over these submerged rocks, filled them with concrete, and put a platform along the top, about 16 feet long by 4 feet 6 inches wide and 18" through. By doing that we reckoned it was safer. What was

the date of that? 1922.

Did you ask the permission of any authority? Yes, we got permission from the Harbour Board. The job was done by club members. How long after that was the diving board erected? During the same season the diving board was put on. Facing out at an angle of roughly 45 degrees. In which direction did the diving board extend, until last year, in relation to the sea? Roughly east to west, the platform itself. Now in the days when that diving board was first put up, were many people coming to swim at Worsler Bay? Yes, 10 especially at holiday times, quite a crowd. But more people to-day than there were then? I think there would be. Would you say how that diving board came to be destroyed? The one the Club put up? The platform is still there, but we used to have a wooden diving board going out from there. It's been broken several times, and we decided to take the board away, as it wasn't useable. That would be after the late war. Do you remember the last occasion it was broken? I have no idea of the year, but it has been broken by one or two people, not members of the Club, outsiders. Anton Koolman, the gymnastic instructor, broke it once. And shortly after that, 20 was any action taken to get a new board? Well the Club didn't do anything, but I understand the residents approached Mr. Semple. He was on the City Council. How did the new diving board differ from the former one? It was a good deal higher. Someone put on a block of concrete and made it 18 inches or 2 feet higher - I don't know who it was. Would you look at this photograph. Did the previous diving board, that projected out to sea, did it? Yes at the angle of 45 degrees, on account of the rocks. This photo is inclined to mislead you to a certain extent - it's not a continuation, but at an angle.

30 About how long was the board? I should say 8 to 10 feet, from the edge of the platform. It was there originally but every time (a tide gauge) there was a southerly it blew away, and we finally decided it wasn't necessary. Was this board, the new board, put up by the City Council, on the same site? Yes, but slightly higher. When would this have been, before or after the

war? After the war. During the war period the beach was closed to the public. Did your members like the new board? Actually, they used the board very little. What was the reason for that? Most of our time is taken up with swimming and life-saving. There was nothing in the board that they personally disliked, but I've dived off it, and find that there's too much spring in it.

XXD THOMPSON:

I think you've had a very long association with this Club? 42 years. When you were Honorary Secretary of the Club in 1922, 10 it became your job to apply for permission to build this extended platform? Yes. It's really quite a new platform, isn't it? Yes, but the concrete causeway divides the new from the old. You walk from one to the other. But the small one was on the rocks itself, and the big one is quite clear? Yes. Now at that stage the application you made was to the Wellington Harbour Board? Yes. Not the Marine Department? Not at that time. Did the Harbour Board not mention the Marine Department when replying? Actually our Secretary and Treasurer, both civil engineers, had talked it over with the Marine Department, and worked it out with them.

20 Do you recollect receiving a letter addressed to you, dated 27th July 1922, from the Secretary of the Harbour Board? I can't remember it actually, but there is a mention of the Marine Department. The Secretary advised that they were prepared to grant permission after they had seen and approved plans? Yes, those plans were made out and were sent to the Harbour Board. You don't know whether anything was done about the Marine Department? No. No suggestion at the time that the Corporation had any interest in this platform? No, we thought the Harbour Board was the proper authority. We had no control over it. Now when you constructed this platform, did 30 you build some duck-walks as well? We had one duck-walk put on some time later, there's another rock behind the one the old board was on, and the new duck-walk joined the two rocks. Round about

the same time? Yes. You didn't apply for any further permission for that? No, it was part of the job.

Now during those years after you came back from the war, do you know what the terms of occupancy of the Club were? We were granted permission by the old Miramar Borough Council, that goes back many years before this was built. You never heard of a lease from the Crown? No. Did you ever hear of any proposal for a Post and Telegraph store? As a matter of fact, prior to the first war, the Marine Department were going to establish a cable station out
10 there. The plans were to build a wharf jutting out from Worser Bay; that is, where the present diving platform is, but although the shed was taken over by the Marine Department. They offered us £350 for the building which we accepted, or £75 to remove it. We built the present shed on the site given by the Miramar Borough Council.

Are you aware that the land was eventually vested in the City Council? We found that out in later years, we didn't know it at that time.

I think you told my learned friend after the diving board
20 erected by your Club had been broken several times, you decided to remove it? That's quite right. Why we did that was because the end was all jagged and dangerous to children. Was the intention to replace it? That's the idea. When was that? Just after the end of the last war, trusting from memory. It may have been before. During the war period I believe there was a board there, though we couldn't get to it. I don't think anything was done as the beach was closed. I wasn't president at that stage. I might say that at some time, Mr. Semple, a patron of our Club in the early days, he said that anything we wanted he could arrange with the City
30 Council.

There was a letter to City Council dated 17th January 1941? Yes.

Now you said that there couldn't be anything done because the Navy was in occupation? Yes. The Navy Department wrote

and took over in May 1942 until October 1945. Would you agree with that? Yes, I would, it would be about then. I don't think we actually got the shed back then. So that there was nothing to prevent the City Council putting the board there until May 1942? No. During that period there was very little activity in the Club. Most of our boys were overseas.

You are very familiar over the course of the years with Worser Bay, did you ever hear previously of a diving accident? No. The original board erected and replacements were there for something over 30 years? Yes. To your knowledge was anybody ever injured? No, nobody to my knowledge. What would you say was the reason why it had been free of accidents? It was built in such a way that in the first place you have to wade to get out to the board through shallow water, and over the rocks in shallow water. The water was very clear and you could see the bottom quite easily. That is at low tide? Or at high tide. You could see the water was very shallow at low tide? Yes, yes. What about the rocks, any difference at low and high tide? Yes, at low tide you could walk out without taking your shoes off from rock to rock. At high tide, there's 18 inches to 2 feet of water there. Any shell fish or mussels visible on the foundations of the platform around the rocks? Yes, quite a lot. That was one of the reasons why we put the duck-walk in, to save people getting scratched from the mussels on the rocks.

Anyone walking on the platform or along the diving board at low tide, you could distinguish the bottom quite easily? Quite easily. Could you see that it was shallow? Yes you couldn't help but noticing it. If a person had dived from there several times before - (DISCONTINUED).

You did mention about a tide gauge originally? Yes, but there was no point in having it there. It was a rough gauge, tied in with wire, but every southerly that came along carried it away. It was replaced several times, but didn't last even a season. Was it then decided by the Club it wasn't necessary to have it? I think it was taken for granted. It wasn't replaced.

Has there ever been any consideration by the Club to put up a warning notice? We didn't think it necessary. I don't even think now that it is. You base that opinion, do you, on the position? Yes, and in my experience, and the number of years. People couldn't help but notice from its position.

RXD RIDDIFORD:

To return to the diving board, do you have the impression that the setting up was done after the war? There's the platform and then the diving board, the plank itself, rests on two concrete slabs? Yes, but the Club didn't put that there. Would it be possible for the Navy to have put that there during the war? Quite possible, we weren't allowed there then, and I don't know what happened. With reference to the letter written in 1941, do you think that the breaking of the board was prior to the letter being written? No I think the breaking of the Board was after. After the letter was written? Yes. Do you know what action was taken? I have no idea. At that time I was not president of the Club, and didn't attend very many meetings. Is it more difficult to appreciate the depth of the water when looking at it from the diving platform in cloudy weather? I shouldn't think so. It would make no difference. The water is so clear you can always see the bottom quite plainly. The water's always clear, it's never muddy or dirty.

You in fact don't know when the present diving board was erected? I feel certain that there has been more than one board since 1941. The average life of a board is from two to three years. That's from experience and going over different baths, I say that. Who would have put up these boards? The only person would have been the City Council.

COURT: Looking at the photograph, A.3, Mr. Gerry. How much of that structure there can you say for reasonable certainty was put up by the Club? All but that block at the very end, near the board.

The concrete slabs were filled up and levelled up by the Club, boxing put in, three railway irons put the full length between the two pillars, and all levelled off, and it was a finished job. Between the railway irons is the concrete, is it? Yes, the iron is reinforcing the concrete. And at the end there, there's a concrete block, we don't know who put that there, whether it was the Navy or the Council or who it was. And the Board itself, that wasn't put up by the Club. It may have been put up by the Navy, but I would say that the board there has been put up by the Council in the last two or
 10 three years.

RXD THOMPSON:

As I showed you in this letter, there was an application made to the City Council? Yes. If that board was subsequently broken, would there not have been further applications? Once we took the Board away and the Council took over, we would accept no responsibility for further replacements. You say the Club wiped its hands of it? Club members weren't using it so much, it was more the outside public. The letter looks as if the Club wanted to keep the board there? They were catering to a certain extent for the general public; Club
 20 members very seldom use it. The Board was never used by Club members unless at high water.

In re-examination you said you had very little to do with the Club in these years? I wasn't on the committee then but I still went a lot. Would you know if the board had been broken and replaced several times? I would. But you wouldn't know who replaced it or who broke it? I know of one instance when it was broken, I have mentioned it. He was doing acrobatic feats on it, and it broke.

COURT: Was that at high tide or low tide? I think it was
 30 low tide actually.

WILLIAM TREHERNE PHIPPS: I live at Seatoun Heights, Wellington.

From 1951 to 1954, I was employed by the City Council. I am a custodian of the pavilion of the beach on Worser Bay. Did you know the diving platform? Fairly well. Did you ever wade out in rubber waders? Yes, on different occasions, when I had to.

What is your impression of the shallowness of the water? The first time I went there I was rather surprised, the water is very clear.

I stood on the board, and I looked. The water was so low that I was able to stand in the water, and it wouldn't be more than 3 feet.

10 Was it what you expected, being as shallow as that? Oh yes, this morning before I left home the tide was going out at 9.00. From where I live, about 200 feet above sea level, the tide was going out, and I could see the bottom very clearly then. The water there all the time is very clear. At both high and low tides? Oh yes. It's the clearest water in a bay that I have ever known, no dirt or anything, very clear.

XXD THOMPSON:

Your house overlooks the bay? Yes. How long have you been there? 25 years. I've lived in my house 25 years, but I've known
20 the bay for 30 years. Have you ever heard of any previous diving accidents? None whatever, not the whole time I've lived at the bay or worked there as a custodian. I've never seen any accidents, and when there's a low tide, people definitely do not dive from that board. Have you ever seen anybody attempt to dive at low tide? Never. I think they do, but I've never seen them. Have you seen people go down to the edge of the board, look and come back again? Oh yes they do that from curiosity, they look down into the water, and they can see the actual depth. Would you say that at low tide from the platform, you could see that the water is very shallow? Yes.

30 On the way out to the platform at low tide, would you describe the conditions? Well you have to walk out a fair way in high or low tide. At low tide you'd have to walk out 30 or 40 feet, even then

you'd only get wet up to your ankles. It's very low practically the whole of the year.

Now as custodian, just what do your duties comprise? Just keeping the bathing shed which belongs to the Council and the beach and things in general tidy. I'm not of course in any way responsible for the public. Have you ever heard any suggestion or a complaint made to you about not having a notice? No, people have never mentioned it to me, and if they had, I would have been surprised, because it's not wanted. You see, when I live where I said, 200 feet up, I can see the bottom of the water at high tide, let alone low tide. Often
10 I've looked and thought you could see sufficiently.

XXD RIDDIFORD:

Are you a swimmer yourself? Yes, a poor one, but I can swim. Do you often swim nowadays? Oh, occasionally in the warmer days. It's refreshing after a morning's work. When you first went out in your rubber waders, had you been out on the diving board first? No, there was no need to. I actually went out on that occasion to fling a piece of timber in. And as I did it, I just reached up to see if I could touch it. I had been up and I could see that the water was perfectly clear.

20 COURT: During the three years that you were custodian there, do you remember whether the board was ever replaced? No, I don't remember it was ever being replaced to my knowledge. It never wore out and was replaced? No, not to my knowledge.

(CASE FOR THE PLAINTIFF CLOSES)

Rocks: - It is admitted that Rocks 1, 2, 3, 4 and 5 are the property of the Wellington City Council, and Mr. Thomson undertakes to put a plan in by a witness to show these rocks.

THOMPSON OPENS AND CALLS:

GEORGE KEITH RICHARDSON: I reside at 8 Talavera Terrace and am employed by the City Council. I produce a photostat copy of a survey plan, 16620, that is a proclamation plan made in 1912 for taking property of the Post and Telegraph Department for stores and wharf site, relating to a part of Worser Bay, the north-eastern portion. (EXHIBIT 1)

On that plan, Mr. Richardson, in addition to the main lands, it also shows certain rocks in the vicinity? Yes, five rocks in that particular area. Did you also search a certain title of land for ownership? The certificates of title for the adjacent land is based on taken from the Survey Office Plan. Could you give the references to the titles you searched? Certificate of title 219/261, dated 24th January 1913, shows the land was taken by proclamation 837 in the name of H.M. the King for Post Office store and wharf site. The next change in the title? Proclamation 2095 taking the above land for purposes of a pleasure ground, vesting same in the name of the Mayor Councillors and Citizens of Wellington, dated 4th September 1930. I think you've told us that this was based on the plan? Yes. Following that a new certificate of title was issued, 414/180, 16th February 1931, that land is held for pleasure ground. That is still based on the plan. You also prepared a site plan, which you now produce. That is the plan which Your Honour has. (EXHIBIT NO. 2)

On this plan is shown various things? Yes. I have shown there five rocks, numbered 1-5. They are in close proximity to the rocks shown. A further rock, rock A which I took levels on, and I have also observed it at high tide, and it would be just at high tide, the peak of it. It would not be one of the higher rocks shown on here. Did you estimate or take a level from the other rocks? I have taken levels on all five rocks, and the levels show them to be approximately 2 to 3 feet above high water. In addition to the rocks, you have also shown other features? I have

shown two duck-walks leading to the platform. Levels were taken at each end of these duck-walks. The first duck-walk, or innermost duck-walk leading from rock A to rock 5, is below high water. Is that at each end? From memory at each end, yes. Looking at the plan again, yes, at each end. The whole duck-walk? Yes. The second duck-walk leading from rock 5 to the diving platform would be above high water.

As the result of your survey and search of titles of the two rocks, 5 and rock A, what have you to say as to the ownership?
 10 I would accept rock 5 as being one of the rocks shown on the certificate of title. Owned by the Corporation? Yes. And Rock A? It is practically submerged - there might be just a tip above high water, and it is not owned by the Council.

I think you've measured the distances, have you a note from the bathing club shed? Yes, measurements from official plans. From the bathing shed to the platform, approximately 160 yards. From the bathing club shed to the surf club shed? Approximately 140 yards. From the surf club shed to the diving platform? Approximately 70 yards.

20 XXD RIDDIFORD:

Do you know the original purpose for which the Post and Telegraph Department required plans? It states on the proclamation that it was taken for a store and wharf site. You know that the proclamation included the outlying rocks? Yes. It is to be presumed that the Post and Telegraph Department intended to put those rocks to some useful purpose? I would assume so. And it would know what particular rocks would be useful? That's correct. The rocks are shown on the certificate of title at the Land Transfer Office? Yes. When you were first asked to conduct a survey,
 30 your task was to identify those rocks, was it not? There is difficulty here, sir, if you are referring to a sketch, I was not involved in that

I was not doing a survey for the sketch. The only plan I have done of Worser Bay is that one there.

Supposing that the certificate of title were put to you, you would not disagree that the rocks shown in the certificate of title agree with the rocks shown in the 1912 proclamation? Yes sir, the certificate of title is based on that plan. Turning to this plan, your task was to identify five rocks? My instructions were to make a site plan of the area. But amongst other things, to identify five rocks? That would be correct. There's no question about No. 1, and there is no difficulty with respect to 5, but with respect to this one, did not you originally think that this was one of the rocks in the proclamation? No sir. Did anyone else in your Department? I couldn't say. Who are the others? That plan was done by a junior in the office, an engineering cadet. Mr. Falconer treated the plan, the City Surveyor, treated the plan as purely a sketch. Did you inform your solicitor that it was treated purely as a sketch in the first instance? I have no instructions as to that. Anyway in regard to this sketch, that rock there was identified, was it not, with the proclamation, was it not? I could not say, sir. Would you deny that that is the sketch plan? That is the sketch plan, but I had nothing to do with the measurements, or the drawing of it. Looking at the proclamation plan, you would agree that the rocks marked green reproduce the site of the rocks marked on the proclamation? They appear to be approximately the same. You agree, do you not, that the junior, Melvin Dunn, in selecting this rock chose a rock much nearer to the rock shown on the proclamation plan than the one which was later taken to be the correct one? Yes. Which is the rock later chosen as the correct one. It's marked No. 4, I think. So he had to go up here (indicates). How would you mark the original five? The only difficulty is where four should lie. It would appear that the position of four has been moved right off there? The scale there is 10 feet to an inch, and it's not very far. But in relation to the other rocks, it's quite a proportion? This plan was done in 1912. The method of doing it was off setting from a straight

line. My method was pin-pointing from the shore with measurements taken on staff readings, or generally known as stadia. I consider that my method would fix those rocks with a greater degree of accuracy than was done in 1912.

However, that doesn't really quite cover the point. You've already agreed that that rock was nearer to the rock marked 4 on the original plan, but it was considered to be wrong because it wasn't projecting sufficiently? It wouldn't be accepted as a rock, because it wouldn't be a rock at my work. At the highest point it is shown an inch above high water. How large is the surface of this inch? A very small point. How much? I couldn't say.

You've had time during the night to reflect on what the City Council wanted done. Have they taken you to task? No sir. You would not dispute that Her Majesty the Queen could by proclamation vest the whole of the bed of the harbour including the rocks in the City Council? I don't know, it's a question of law, but it would be most unusual. It could be done? I wouldn't like to say. You agree that the position of the rocks on the certificate of title are correctly shown? Taking into consideration how they were done, they are relatively correct. The proclamation or the certificate of title? They are the same. They're not the same if you compare them. That sir I would not accept, it is not an official survey plan. Well making a comparison between them? I would say for all intents and purposes they are the same. Not identical? Taking into consideration the scales, I would say they are identical. The title on this plan is covering the rocks coloured green, not the red ones. Which are the correct ones? The red ones were the ones picked up by the engineering cadet. The green ones are taken from survey office plan 16620. So you didn't rely on the certificate of title but the survey plan? This is not my work, sir. That makes it difficult. But as far as you know? I submit, sir, that the survey office plan and the certificate of title are identical. I put it to you that they are not identical. Have a look at this plan. I still maintain they are identical. In every respect? In every respect. One fits exactly over the

other? Yes.

Well then, has application been made to the Land Transfer Office for rectification of the title? No. The Council would not be interested in ownership of rocks. In that case the Land Transfer title which you say is identical with the 1912 survey plan is the official title of the Wellington City Council? That is correct.

RXD THOMPSON:

What is the scale of the survey plan? 1 chain to an inch,
10 which is 66 feet to an inch in feet. What scale is the site plan?
10 feet to one inch. In comparing positions of rocks and so on,
would that difference in the scale have any effect? In drawing, yes.
The large plan is approximately $6\frac{1}{2}$ times larger than the other plan.

RXD RIDDIFORD:

You would not dispute that this is an actual tracing of the certificate of title? It appears to me to be correct, but without comparison with the original, I couldn't say exactly.

COURT: Is the certificate of title available? The Council has an identical copy, a duplicate of the copy of the title. Could
20 you check that in the course of the next hour? I could produce it for viewing, and I would prefer to bring the other one down. I'll bring the official Council one down and check it.

RXD RIDDIFORD:

You have the certificate of title? Yes. Could you compare it with that tracing? It's rather hard to see. It's a bit thick to see through to the position of the rocks. I can't see it. I'd say it looks very similar. (Certificate of Title, EXHIBIT 3)

Have you made any comparison between the certificate of title and the survey plan? I have. They are in agreement. What is the amount of error between them? Any error would be in the draftsman transferring the drawing from the plan. They would be accepted as
 10 identical. What amount of error did you see? Very very slight, maybe a foot, but not much more. That would be in the shape of the rock only. The general positions are the same. You yourself have been to Worser Bay? I have. What is the actual distance of the rock you identified from the one marked A, from Rock 4 to Rock A? May I scale it? Yes. 45 feet. Could you make an estimate of distance between the rock marked 5 from the rock in the outline? The comparison between the two plans? There is a plan, without a number, a rock with no number attached, and I believe that rock could be identified as the rock in our plan? No, I can't agree with
 20 that, sir. You agree with that sketch, from that it would appear to be so? That rock is submerged. Leaving aside the question of whether it is submerged or not? It's only 2 inches above the water at high tide. But its location would actually be considerably closer to the rock shown on the proclamation plan of 1912? I agree with that.

EDWARD HUTT: I reside at Botanical Gardens, Wellington and am the Director of Parks and Reserves for the Wellington City Corporation. Did you join the Corporation's services in November 1946? Yes, and I took up my duties as Director on 1st February 1947.
 30 You've the Corporation's records regarding Worser Beach, have you? Yes. And you saw there certain letters dealing with an

application in 1941? Yes. Would you look at this letter, Mr. Hutt, and also this letter. I ask you to produce those. This is a letter from the Honorary Secretary from the Worser Bay Life-Saving Club dated 17th January 1941 (EXHIBIT 4) addressed to Secretary, Reserve and Beaches Committee. This is requesting approval to put up a board. The second from the Town Clerk to the Worser Bay Club, on 14th March, 1941, informing the Club there was no suitable timber available, but that arrangements were being made to import the necessary timber in order to renew the board before the next bathing season. From your examination of the records, can you say what happened? The Council's offices made inquiries in New Zealand, and found that no suitable timber was available in the country, and a firm were instructed to procure a suitable length of timber from America. Hard Douglas fern was considered the only suitable timber, commonly known as oregon pine. The order was placed and the timber arrived in New Zealand in October. Did Odlin's then deliver it to the Corporation? They shaped the timber for diving board purposes and delivered it to the Corporation yard. The records show that the diving board was erected in November of that year, 1941.

20 In your experience since you've been director, has the Corporation ever had other requests from the Club? Yes, the Swimming and Life-Saving Club render good services in the city. The Corporation frequently have requests from clubs for assistance by way of material, and these requests are invariably complied with. I suppose the Corporation sometimes makes advances in money too? Yes, the Corporation during the present financial year made a grant of £2,000 to one of the Clubs.

30 When you took over the control of the Reserves Department, did you carry out an inspection of the grounds involved? Yes, I inspected all the parks, reserves and beaches under the control of the Department, including Worser Bay. That would be in 1947? Yes. Early 1947. Would you describe what you found in Worser Bay? Yes, the conditions at Worser Bay in those days were very different to those existing to-day, because of moving sand. I was anxious to improve the conditions in Worser Bay. These

improvements have been carried out by the formation of lawns which arrest the movement of the sand. Did you inspect any other matters in the Bay? I inspected the whole of the buildings and the diving board and platform. Would you describe what you found on the diving platform? The diving board was in a position pointing approximately south. The board was in good condition, and it had apparently been in that position for a number of years. On what do you base that? The corroded condition of the steelwork upholding the boards in place indicated that it had been there for a
10 number of years. Now since 1947 when you took over office, can you speak directly as to requests for further materials? Yes, the only request received by our Department in connection with the diving board at Worsler Bay was the request for the renewal of the coconut matting on the board. You know when that was done? That was in 1949, and I inspected the walk. It was in a slippery condition, and at the request of the Surf Club the matting was renewed, and the renewal simply made the slippery surface safe.

After this accident, was the diving board that was then in position removed? Yes. Have you inspected that board since its
20 removal? Yes. What was your impression of it? The board was the same board as was there in 1947. The board was in a very sound condition. There was no sign of rot, and it had only very minor sun tracks, which were in no way detrimental to its strength. Did you measure the board at all? Yes, the board was approximately $14\frac{1}{2}$ feet long, I think 14 feet 5 inches. It was 18 inches wide, and at its fixed position it was 3 inches in depth, and it tapered to approximately $1\frac{1}{2}$ inches. Can you say from the measurements taken what was the overlap of the board over the sea? Yes, approximately $8\frac{1}{2}$ feet, 8 feet 4 inches exactly.

30 Have you anything to say about the qualities of the timber? Yes, probably in no other timber is there so much difference between sap and heart timber. Clean heart Oregon is one of the most durable and strongest timbers in the world. Very little of this timber is brought into the country, this class of timber, it is usually only brought in for special orders. Is it easy to distinguish between

heart timber and what you call sap timber? Yes, the grade of heart douglas fern is red in colour, whereas the grade of sap timber is yellow in colour, or pale yellow. On the platform that is out there, did you notice any protruberance? There is a concrete stand for fixing the diving board, which is part of the concrete platform. Could you describe it as a tongue or a projection? Yes, I noticed the projection of the concrete platform on which the diving board rests. Does it project at an angle to the platform itself? Yes.

10 You are familiar with the conditions at Worser Bay? Yes. Could you describe the conditions at low tide in relation to the area of beach and platform? There is very little water round the diving board, and on occasions I have been out onto the diving board without taking my shoes off, just stepping across. On the way out to the platform, would you describe the conditions of the water on the way? The steps out over the rocks as you go out and the nearby rocks have growth, and it is quite evident it is low tide by the sea growth on the rocks. By sea growth you mean? Marine growth that is exposed, seaweed. Worser Bay is
 20 one place where the water is almost always clear, and it's quite evident that it is low tide because of the clearness of the water. By that you mean that you can see through the water and see what is underneath? Yes. From that are you in a position to judge the depth? At low tide. Anyone being able to see (OBJECTION).

COURT: Do you claim much knowledge of sea water and the like? Yes, sir, it is necessary for me to have a knowledge of such matters.

From your being able to see the bottom, are you in a position to judge the depth of the water, were you in a position to judge?
 30 Yes.

Now, as to the Corporation and the beaches, what is the policy of the Corporation generally? The general policy is to assist the beach in the maintenance of order and decency on the beaches. Any other aspects? It is concerned with the well-being and comfort of

the citizens, and where it is considered dangerous, the Corporation erects notices where conditions are deceptive or not apparently dangerous. Do you know if such a board is erected anywhere? Yes, at Houghton Bay the conditions are deceptive because of the undertow, and a notice is erected there, indicating that it is dangerous to bathe, to enter the water, to bathe or swim. Are there any other type of notices? Yes, where the sewer discharges into the sea, notices are erected. There is one at Ohiro Bay. As to erecting notices on diving boards or diving piers generally, has the Corporation
 10 erected any notices in Wellington? Not to my knowledge. In particular in regard to Worser Bay, has the Corporation had any complaints in regard to the diving platform? No, the diving platform at Worser Bay from the records, it was erected by the local life-saving club, over 30 years ago, and during the whole of that 30 years, the Council has no record or knowledge of an accident ever having taken place. The life-saving club, I understand, had no knowledge either.

As to the Worser Bay beach, how would you classify it? Worser Bay is a very safe beach for bathing, and for that reason
 20 it is probably the most popular. Why do you say it is a very safe beach? The water is always clear, there is no undertow, and it has a gradually sloping beach.

XXD RIDDIFORD:

Do you know when that concrete slab at the end of the diving board was put there? No. Could it have been put there by the City Council? I have perused the records, and I can find no record of its having been put there. Do you realise that the diving board and an area of beach round it were under the control of the Navy between 1942 and September 1945? I understand certain areas
 30 were under the control of naval authorities. Did you know this precise area was? I'm not sure of that. Have you looked through your records to verify what happened through that period? Well if

the area were under the control of other authorities the Council would have no records. Did the fact that you could find no records put you on your inquiry to discover why there were no records? I knew that the foreshore was under the control of other authorities during the war. But you didn't know this precise part was? I'm not exactly certain of that. So you would not be in a position to deny that the naval authorities might have erected that slab? I couldn't tell you. Have you travelled abroad at all? Yes. In Egypt? No. Or Italy? No. Do you happen to know from your reading what the tide variation in the Mediterranean is? No, I don't. Would you therefore not be able to deny that the tidal difference is very small because it is a land-locked sea? I know that tides vary enormously in different parts of the world. You would also be equally ignorant of whether or not there were tides in the Baltic? Yes. When did you leave school? I was 17. You studied geography at school? Yes.

COURT: Has this anything to do with the case at all?

Riddiford: I submit that it does.

You say that you were able to see from the diving board that the water was very shallow? Yes. Do you know what the depth of the water was at a distance of 12 feet from the diving board? The depth of the water adjacent to the diving board I would say not more than 2 feet. Just under the diving board from that position I couldn't say. Then do you know whether it's shallower or deeper at 20 feet from the diving board? I don't know. I think you said to my learned friend that the water at Worsler Bay was ideal for diving because the beach was gently shelving? Yes. It would surprise you then if I told you that there is practically no shelving for a distance of 21 feet from the point of the diving board?

COURT: On the contrary, that seems to be in agreement with what Mr. Hutt was saying.

When was the diving board removed? I think, I'm only speaking

from memory, but I think the September following the accident. You said it was removed by the City Corporation? Yes at the request of the Marine Department. I suppose you regarded it as the responsibility of the City Corporation to do so? No, the diving board was removed at the request of the Marine Department. In my understanding of the position, the Council had no real control over it whatever; it was erected below high water mark, and in my memorandum to the Clerk informing him that the board had been removed I stated that it was removed only as an act of courtesy to
10 the Marine Department. Did the Marine Department accept that position? I don't know.

COURT: That doesn't matter either because the board had been removed, and that was all they wanted.

Did you know that the land which comprises that projecting point at Worser Bay and includes the swimming club shed and the boat club shed, the foreshore and the outlying rocks belongs to the City Council? I'm sorry, not the foreshore, the land adjoining the foreshore and the outlying rocks? I knew that the land on which the buildings were erected was owned by the Corporation, and
20 I also knew that certain rocks were vested in the Corporation. And you regarded it then as being a special responsibility of the City Council in addition to the normal supervision of bathing places throughout the district? If you are speaking of the diving platform and the pier, I never regarded that as the responsibility of the Corporation. I knew that it was erected on the sea-bed, and that it was erected by the Life-Saving Club. Did the fact that the City Council had erected the diving board cause you to think that it was responsible in any way for it? No, it is common practice for the Corporation to assist swimming clubs, and there appeared nothing
30 unusual in the fact that the Council had acted as a source of supply. You knew, of course, that the platform itself was the property of the Marine Department? It is generally accepted that the areas beyond high water mark are the property of the Marine Department, or the Harbour Board on some occasions. You did not know that

the rock which is marked 5 was the property of the City Corporation? I was aware that the rocks were vested in the Corporation. I would say in 1947 when it was necessary for me to make myself familiar with the whole of the areas for which the Department had control. Did you know exactly where the outlying rocks, which ones they were? At this stage it's rather difficult to say, but I'm fairly certain I made myself familiar with the position at the time. Can you say definitely whether or not you knew that the duck-walk which extends from rock No. 5 to the platform was the property of the City Council?

10 I never regarded that as the property of the City Council. I apparently knew at the time that the platform and the duck-walk couldn't be. But about the rock? It was known to me at the time and it has always been known to me that that duck-walk rested on one of the rocks vested in the Corporation. So you were aware that part of the access way along to the diving board belonged to the City Corporation? Yes.

COURT: Meaning the rock? Riddiford: Yes, and that part of the duck-walk that is on the rock.

20 There is another two duck-walks as you well know. I've been referring to the second duck-walk, the one which connects the one which is the property of the City Council. Another duck-walk goes from a rock behind to that rock I was speaking of, the one nearer to the shore. Did you have any positive views at the time as to who owned the second rock? Yes, I knew that Rock A did not belong to the City Corporation. When did you find that out? I knew in 1947. What plans did you examine to reach that conclusion? The plans were in the office of the Chief surveyor, and plans of all Corporation properties are kept there. Did you write a memorandum recording your opinion that this rock was not
30 the property of the City Corporation? No. Did you mention it officially to any of the surveyors? I'm not exactly sure what you mean. The rocks as shown on the plan as being vested in the Corporation - I had no reason to question or doubt them. This is

the plan you examined in 1947? I wouldn't like to say it was or wasn't, it might be. Would you deny it if I told you that according to this plan the rock shown above that rock is far closer to that rock than it is to that rock (indicates)? I can only tell you that I examined the plans in 1947, and had no reason to doubt the correctness of the plan. This plan's correctness? I don't know that that is the plan I examined in 1947.

COURT: Since you were Director, how many times, can you tell me, have you inspected the diving board, prior to the accident? I
 10 imagine I've been onto the diving board about a dozen times, but not with the purpose of inspecting it necessarily. What did you go there for? Because of the amount of work that had been carried out at Worser Bay, and the improvements. I had been immensely interested in the whole of the Bay. Did you at any time, did it occur to you at any time, that a warning board ought to have been put up by someone with regard to diving at low tide from this board? No, sir, because the board was erected by the Life-Saving Club who have a most intimate knowledge of the local conditions, and there have been no records of any accidents, so far as I know. I assume the
 20 Swimming Club considered the board to be safe.

ARNOLD GEORGE THOMPSON SMITH: I reside at 60 Victoria Street, Lower Hutt, and am the Chief Clerk of the Scenics Department of the City Corporation. How long have you been with the Corporation? Over 41 years, in the City Engineer's Department. What is your position now? I am senior officer in charge of the Clerical Division, which includes the Stores. I understand you have been examining records concerning a supply of timber obtained through your office. Would you please describe to the Court?

On 2nd April the Purchase Officer wrote to Messrs.
 30 Odmins, in 1941, in connection with the indenting of Douglas fern suitable for diving planks? Yes. 12 planks, 14 feet length,

18 inches wide, 3 inches thick, one end tapering off to $1\frac{1}{2}$ inches. You've also seen the reply from Odlins, on 7th April, that they were prepared to indent? Yes. Following that on 10th April there was an order placed. Now I ask you to look at these cards, are they official stores cards? Yes, I now produce them, showing a record of the timber supplied by Odlins. They show the quality of timber received from Odlins, on 3rd October, 1941. There is a 12 14' plan with the measurements. The other cards show a record of the timber as it went out of the Corporation Yard store.

10 What is the first entry on the card? Dated 5th November 1941, Job 5300, one plan. Can you say from your search of the job register what job it is? Yes, it relates to work done in the Seatoun, Worsler Bay area. On the cards there is certain information relating the job number to the cards.

That information relating to the job number, where was that obtained from? From the Job Number Register. You have checked the information? I have. Is it correct? Yes, reasonably. The second entry on the disposal cards is dated 30th March 1942 and was one board of 14 feet length, Job 5880, for Karori Baths. Is stock 20 taken as at 31st March in each year? Yes. Did you inspect the sheets? Yes, I did, they showed stock in hand of 10 boards. Without going through all the other entries on the card, do any of them relate to a job number at Worsler Bay? No. Put another way, there's no entry relating to another diving board at Worsler Bay at a subsequent time? No. What is the stock now on hand? 8 feet left of one board. All the rest has been disposed of to other places? Yes.

XXD RIDDIFORD:

30 Relating to Job No. 5300, November 1941, you say it relates to work done in Seatoun/Worsler Bay area? Yes. You assume that the board was erected in Worsler Bay? It was requisitioned for a job in Worsler Bay, that's as far as our records go.

You have no other records relating to any other boards? No. Not since 1941. And before 1941? No. As far as you know the board then erected is the board in existence up to September 1954? I couldn't say. Only one board has been issued from City Corporation stock.

ERNEST KILBY: I live in Wellington and am in charge of the timber yard of the City Corporation. I have worked in the yard just over 30 years. That brings you in close contact with timber of all sorts? Yes. On 16th May 1955 did you examine a diving board in the Corporation store? Yes, I did. Would you describe the board
 10 you inspected? It was Oregon, 14 feet 8 inches long, 18 inches wide, 3 inches thick and tapered from 3 inches to the diving end, $1\frac{1}{2}$ inches. Could you describe its condition? It seemed to be in excellent condition, a straight grain, a hard condition indicating heart timber, a few sun-streaks on one side, it had evidently been exposed to the sun, but in excellent condition. Were there any additional features? Yes, it was bound on the diving end with a strip of solid jarrah, and also in the middle with another piece and a steel band. Would you describe what heart Oregon is like? It would be of a hard texture and straight grain, whereas a sap timber would be of straight grain
 20 but of a more yellowish colour. Have you any opinion as to the durability of heart Oregon as a diving board? I'd only say it's unsurpassable - it had many years use in it as a diving board or as a spring board in a gymnasium. Can you say anything as to the availability of the timber of its quality and size? Yes, sir. A firm I am associated with, Odlin's, would only import that under a special order, in that width and dimensions. We invariably import that timber in 12" width.

XXD RIDDIFORD:

I think you said the board was 3" thick in one end and tapering
 30 down to $1\frac{1}{2}$ "? Yes. Would that have the effect of making the diving board more springy? Yes, it was usually considered to do so.

COURT:

Have you had other experience of diving boards? No, sir, I can't say I have. I wondered whether you could tell us whether it

was the standard shape? No, only over the years they have to be imported in suitable timber and that shape and size. Is it usual for diving boards to be thicker at the butt end than at the spring end? I couldn't be definite, but I think they're usually tapered.

FREDERICK COLLIS WOOD: I reside at Seatoun, and am a civil engineer. You are a member of the Worser Bay Boating Club? Yes.

On Saturday, 9th January, 1954, had you been out for a sail in the boat? Yes, I'd come in for lunch. Could you tell the Court whereabouts you were? Almost directly in front of the Worser Bay
 10 Life Saving Club. What were you doing? I was doing something to the boat, I can't remember exactly what. Would you describe to the Court what you saw and did? Yes, I was standing close to the boat, and I looked up and saw a man on the spring-board. There were other people about on the board. I can't remember how many. It was low tide. I did not think that the man would dive, but to my surprise I saw him walk quickly along the board and dive. I tried to call out but he moved quite quickly, and did not pause on the end of the board. I waited until a few seconds, when he did not appear I ran into the water and lifted him up until the life-saving
 20 boys arrived.

Could you describe the dive that he made? It's difficult to describe, but he did not dive cleanly and with spread as a young man would dive, but appeared to, I can't think of a good word, more slump into the water. When a younger man dives he dives with spring, shoots out, but this man dived heavily and more steeply. Did you see the position his arms were in? His arms were not as high or as far back as a younger man would have them. They were about 45 degrees to horizontal, I suppose. That is a recollection - I know that his arms were more in front of him than they would have
 30 been in a capable diver.

Mr. Wood, do you occasionally or frequently see people go out to the diving platform? Yes, often. What do they do? At low tide? I see people there at all times, high and low tide. Those that you see go out there, what do they do, at low tide? Well, they don't dive off the board at low tide. Perhaps you would describe the conditions which a person at low tide would pass through on the way to the diving platform? They would wade

out until they reached the rocks at the end of the diving board, and probably scramble along the rocks. When you say wade out, how deep would the water be? The deepest water they would wade through would be waist deep, on the other hand they could reach it without getting beyond knee deep.

You had been on the water's edge some little time? Probably 20 minutes. Had you noticed any other children in the water? I know that there were people bathing; it was a sunny day in the holidays and there were many people on the beach, many people
 10 bathing. I did see people there, but I can't say how many. You recollect any in the vicinity of the diving plank? There were people on it, and on the rocks round it, and there were people between the board and the beach, quite close to the board - certainly people in the vicinity.

XXD RIDDIFORD:

Did you see the route that the deceased took when he went onto the diving board? No, I'm sorry, I didn't see him until I noticed him on the board. Do you remember the little boy that was with him? No. If you look at the map here, if one was going
 20 along here (indicates) where would the deepest water be? I can't answer that one specifically, but I think it gets deeper here, (indicating). I know that on that particular day right at the end of the board it was waist deep, the water was waist deep, where you would dive.

DESMOND JAMES VEVERAGE: I reside at 171 Totara Road, Miramar, and am a clerk at Hicks Smith & Sons Wellington and am a member of the Worser Bay Life-Saving Club. How long have you been a member? $2\frac{1}{2}$ to 3 years.

Do you swim much at Worser Bay? I've been swimming there for about 10 years. On Saturday, 9th January 1954, I understand you'd been for a swim? That's right. I'd changed out of my togs into beach shorts and a jersey, and I was just outside the Surf Club-house, on the corner - we usually sit there. What were you doing? Lying in the sun, sun-bathing. Had you been there for long? About an hour, I suppose. We usually spend most of the day there in the summer, but I'd been lying for about an hour there after my swim.

10 The bay would be more or less under your observation? Yes. Had you observed any children in the water? There were quite a few children about playing in the water. Can you say whether any of those children were in the vicinity of the diving platform? Yes, there were several round about 15 or so feet away from the board. Did something happen to draw your attention? Yes, somebody sang out that there was something out in the water. I looked and I saw what appeared to be a life jacket, at the bottom of the diving board, just straight down from the board. Then one of the other chaps realised it was a person, and we both went out and brought
20 him in. Now you told us you had your beach shorts on? Yes. Can you judge from those where the water came? It didn't come to anywhere near my shorts, not above my knees. You're a fairly tall man? Well above average, 6 feet 3 inches.

Would you describe the conditions generally that a person would see going out to the diving platform? There's quite a fair stretch of sand before you reach the water. Most people going out to the diving board usually go straight to the water to the rocks. There is a way through the rocks, I mean the big rock at the edge of the concrete, rock 5. At low tide, what would you say the
30 depth of water was? Roughly about knee depth for the average person, not much more. That's at the rock.

If you are on the platform, walking along there, what do you see? You can see the bottom a way out, it's very clear.

XXD RIDDIFORD:

I don't think you saw the actual dive? No. You say the water came up to your knees? Yes. How deep is that? Just over 18 inches. I suppose the water is so clear you can see the bottom at high tide as well as at low tide? Not quite, you wouldn't see it at high tide. I don't know what the depth is. I don't think you can see it at high tide. I never use the board as I wouldn't be too sure. The only time I use it is for lying on and sunbathing.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN: EWA PERKOWSKI of Wellington
Widow of ANTONI WITOLD PER-
KOWSKI, deceased

Plaintiff

AND: THE MAYOR COUNCILLORS AND
CITIZENS OF THE CITY OF
WELLINGTON

Defendants

10

Hearing: Wednesday, August 17, 1955

Counsel: D.J. Riddiford for Plaintiff
A.B. Thomson for Defendants

SUMMING UP OF HUTCHISON J.

20

Mr. Foreman and gentlemen of the jury, this is a case of a type that the law places upon the shoulders of juries for decision. The law does that in the confidence that the jury will deal with the case as a judge would have to deal with it if he were sitting without a jury, that is consider it calmly and unemotionally, and not be led away by any emotional feelings that might cloud the judgment, but arrive at a dispassionate and calm decision on the facts as you gentlemen see them.

30

One must necessarily have sympathy for the widow, but that is a matter that you must not allow to cloud your dispassionate consideration of the case on the evidence. I join with counsel, too, of course, in saying, and it is entirely unnecessary, but I do say it, that a new New Zealander stands before the law in New Zealand just exactly the same as if he were a born New Zealander. I say that, thought it is quite unnecessary, I am sure, to do so.

Now in this case, Mr. Foreman and gentlemen, it is my duty to tell you what the law is. It is entirely for you to make up your own minds on the facts. The case has taken quite a long

time; you've had a view, you've had the benefit of the addresses by counsel, and I do not think I will say very much about the facts at all myself, but insofar as I do make any reference to the facts, if I appear to indicate any view, you will understand that does not bind you in any way, because you are the judges of the facts and not I.

The plaintiff alleges against the defendant that the defendant Corporation was the occupier of this spring-board, the premises which we call the spring-board, or the part immediately
10 around the spring-board, but primarily and essentially the spring-board, and she says that the spring-board at low tide constituted a concealed danger, and the important word, of course, there, is concealed. She says that there was a duty on the defendant Corporation to have maintained a warning notice-board or a tide gauge or something of that sort that would warn people to keep away from the spring-board at low tide. The case is put primarily like that, but secondarily it is suggested for the plaintiff that, apart altogether from the question of whether or not the defendant Corporation was an occupier of this spring-board, that there was
20 a duty on the Corporation simply because it erected the spring-board to have taken steps to put up a notice-board or gauge or something of that sort, on the basis, that, when it put the spring-board up, it should have foreseen that it would be a danger to people if such a notice-board or gauge was not put up. That secondary submission of the plaintiff is not by any means a clear one in law, as to whether it holds good or not, and counsel have agreed that that is so - and as you know, Mr. Foreman and gentlemen, counsel and I took some little time framing the issues that are put before you. The questions were not settled without some
30 difficulty. Those parts of Question 1 (a), (b) and (c) are all directed to the primary allegation relating to the occupancy, as alleged, by the City Council of the spring-board; but the second question is put to you on the basis that there was no occupancy, and on this basis, Mr. Foreman and gentlemen, counsel are in agreement that there is an underlying and difficult

question of law as to whether or not, if it were not an occupier, it owed any duty at all to the deceased, and accordingly that second question is put to obtain your verdict as to whether or not there was negligence on the part of the Corporation, apart from any question of its being occupier of the spring-board, but your answer to that question is not necessarily conclusive, as it would be left to me to decide that difficult question, which counsel would argue before me, about the Council's duty if it were not an occupier. Of course this question will only arise if you find that the Council was not an occupier of the spring-board. I have stated that so that you will understand how the first and second questions stand in relation to one another.

The defendant denies these allegations that are made by the plaintiff. It denies that it was an occupier and the other things set out in the first question, and it denies that in law there was any duty on it to exercise care unless it was an occupier, and further it denies negligence on its part in any event. It says that this fatality was due to the negligence of the deceased, Mr. Perkowski, in diving off that board the way he did, and when he did, as described in the evidence. It says that that was the sole cause of the accident, and, if it was not, it was a very major contributing cause to it, and that is the way the defendant puts its case to you.

Negligence is simply the failure of a person to exercise the care that an ordinary reasonable man would exercise under all the circumstances. No person is expected to exercise the highest possible degree of care, but every person is expected to exercise the care that an ordinary, reasonable, prudent man would exercise under all the circumstances in what he does, for the benefit of others and for the safety of himself. If a man exercises the care that an ordinary reasonable man would exercise under all the circumstances, then he is not negligent. If he fails to do that, then he is negligent. You, Mr. Foreman and gentlemen, are twelve ordinary, reasonable men, brought here from your ordinary occupations without any special training for this duty you have been called upon to undertake, but, with the composite common-

sense and experience of the twelve of you, you are very well qualified to say whether under the circumstances the conduct of any person measured up or failed to measure up to the standard of the ordinary reasonable man.

What we are concerned with in any case in which fault is alleged by one person against another, and by the other against the one, what we are concerned with is effective negligence. Effective negligence is negligence that did, in fact, substantially bring about the unfortunate result, something that caused or contributed to that unfortunate result. Mr. Foreman and gentlemen, if there was some lack of care in some way or other, but it had no effect, then we would not be concerned with it, but if it was effective, if it caused or contributed to that result, then we are concerned with it.

In a civil case, Mr. Foreman and gentlemen, where there are allegations by one side against the other - and the Plaintiff, as you know, makes certain allegations against the defendant and the defendant makes certain allegations against the deceased; for the purpose of the case the deceased and the plaintiff are linked with one another - when there are allegations of that sort, the burden of proof of the allegation rests upon the party that sets it up. On one part of the case the burden rests upon the plaintiff to show that the defendant was at fault, and on the other part, the burden rests upon the defendant to show the plaintiff was at fault. But this is a civil case, Mr. Foreman and gentlemen. If any of you have been juries on criminal cases, you will have been told that there is a very heavy burden of proof that rests on the Crown, and that burden is always on the Crown, speaking by and large, except in special exceptional cases, because the Crown has to prove beyond reasonable doubt the guilt of the accused person. This is a civil case, and it is different in two ways; first the burden of proof on one part of the case rests on one side and in another part of the case on the other, and secondly because it is not so heavy a burden in any event. You put the evidence in the scales, and, if the scales weigh down on the side of the party on whom the burden rests, then he

has discharged the burden of proof that rests upon him. If, on the other hand, they weigh down on the other side, or if the scales remain in equilibrium and don't weigh down on either side, then he has not discharged the burden of proof that lies upon him. In a civil case such as this one, the burden of proof can be discharged on a balance of probabilities, the case being viewed by the jury as men of the world, as they undoubtedly are, weighing up all the probabilities, having regard to the evidence.

Now I am going to turn to the first and second issues.

10 Now you see the first question has three parts. The first sub-question (a), Was the defendant Corporation occupier of the premises comprising the spring-board? and the second and third sub-questions are both introduced by "If Yes". The whole of these three are sub-clauses of the first question. That is intended to draw your attention to the fact that they are all sub-parts of the first question. If you answer (a) no, then you do not need to deal with (b) and (c), as you answer those only if (a) is yes. If you find in answer to (b) that the answer is no, then you do not need to bother about (c) as obviously
20 the defendant would not have to do anything under that part of the question. If your answer to the first sub-question is yes, then you would go on to the other sub-question. There is not much difficulty, you might think, about (c), because if you answer (b) yes, you will probably think that (c) is yes logically. If you answer (b) no, then it would logically follow that (c) would be no also.

Now question No. 2, as I have explained, and I will tell you again, Mr. Foreman and gentlemen, that is on the basis that the Corporation is not an occupier, and if you
30 answer no to the first question and answer yes to the second question, it does not necessarily mean that the plaintiff wins the action, because it would just mean that your finding is that there was negligence, but it would not necessarily mean that that would give the plaintiff the verdict, as I would still have to answer the legal question as to whether there was

any duty to take care under those circumstances. I have tried to make it clear to you, and I hope that you understand the relationship between the first and second questions.

Now I am going to tell you a little about the law.

Generally speaking, the law is that, when there are dangerous premises and this is put to you on the assumption that the spring-board was dangerous, but you deal with that later on, the law is, generally speaking, that liability for dangerous premises is based on occupancy or control, not on ownership. The person responsible, if someone is responsible, is he who is in actual occupation of the premises for the time being whether he is the owner of them or not. For it is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons. Now we have been told in this case to take into account the fact that the harbour belongs to the Marine Department or partly to the Harbour Board, and not to the City Council, therefore things that stand in the bed of the harbour, like that concrete erection, belong to the Marine Department or the Harbour Board. The question is not to whom it belongs, but who occupies it, and the question of that is based on occupancy or control, not ownership. The person responsible is the person in actual occupation of the premises with which one is concerned in any particular case for the time being, whether he is the owner or whether he is not, because it is he who has the control, and can allow people to come or not to come. The defendant says it is not in occupation of the spring-board. I do not want to deal with the evidence in detail at all, but they say that they merely made the spring-board, and put it up for the Worser Bay Surf Club because they were asked to do so, and those letters are there and you can see them, and you had the evidence from Mr. Hutt and again from Mr. Smith that they simply produced it and put it there for the Surf Club. On the other hand, the plaintiff says that, having regard to all the circumstances, that rock and the fact that they did put the spring-board there, that you could properly find that they were the occupiers and that they had the right of stopping people going there, and permitting

them to come there. Don't worry, I suggest to you, about the removal of it after the fatality. After all, there had been a fatality, and somebody would remove it and had to remove it in case there was another one. It was said that the Marine Department asked the City Council that it be removed, and the City Council removed it without worrying about whose responsibility it was to remove it.

Was the defendant Corporation occupier of the premises comprising the spring-board? You must answer this question yes or
 10 no. If you answer it no, you don't have to worry about the other sub-parts. If you answer it yes, then go on and answer (b) and (c).

There are different classes of people who enter into premises. I am thinking of people in the position of the deceased. They may be invitees or trespassers. He was not either of these. He was what we call in law a licensee, a person who enters on the premises occupied by someone else by the permission of the occupier, which is either granted in terms or tacitly, and which is permission granted in a manner in which the occupier has no interest. That aptly covers the deceased. The City Council, if it was in fact the
 20 occupier, had no interest in this place. It did not charge anybody, but gave its permission tacitly. He is not in the higher class of an invitee, because the City Council, if it was the occupier, had no interest whether he came there or not. The occupier would have the right to refuse permission, and the deceased went there on those terms. It seems to be quite clear, and I so direct you, that the deceased was a licensee.

What duty does an occupier owe to a licensee? An occupier owes a certain duty to a licensee, but it is not as great a duty as that which he owes to an invitee. An invitee is a person who
 30 pays to go in, say, to a theatre or a cinema. If a person was injured in a theatre, he would be an invitee because he paid to go in. If a person is only a licensee, as the deceased was, he has not paid anything, so then the duty of the occupier to that man is not as high. This is the duty: The occupier is under no obligation to make the premises safe for the licensee. He must

be content to take the premises as they are. But although the occupier is not bound to take care to make the premises safe for the use of the licensee, he is under an obligation to give warning to the licensee of the existence of any concealed danger which exists on the premises and is known to the occupier. He is not entitled knowingly to lead a licensee into a trap. By the term "concealed danger" we mean a danger that is not known to the licensee or obvious to the licensee if he used reasonable care. It is an absolute defence to an action against an occupier that the danger was actually known
10 to the licensee. Even if he did not actually know of the danger, he has no cause of action if the danger was so visible or obvious that a licensee using due care for his own safety would have discovered it for himself before coming to any harm. Against dangers that are obvious like that, the occupier is not bound to warn the licensee, because they are not concealed dangers. The licensee can recover only if he can show that the occupier led him into a trap by permitting him to enter the premises which he, using due care on his own part, reasonably supposed to be safe.

You can see how important it is for the purpose of
20 deciding whether or not a danger is a concealed one to consider all the surrounding circumstances, and to consider what is reasonable care on the part of the licensee. Reasonable men under certain circumstances may assume something to be safe, in other circumstances they may not assume it, but must look to see whether there is danger. Those are matters which are covered by the second question, and you have all the evidence, Mr. Foreman and gentlemen, that has been in the case. There was, of course, as we now know, a danger, as a man has been killed, but the question is: Was it a concealed danger at the time immediately prior to
30 the fatality? You have had all the evidence. There had been no fatalities in over thirty years. If it is important that the height has been raised, I mention it, but I do not know that it has any great bearing on the point. You can take it into consideration if you think it important.

Now there was one point that should be mentioned in connection with this question as to whether it was a concealed danger, and it is this: The deceased was a Pole. He was born in Warsaw, or somewhere near there, and it seems from the evidence that Poles, speaking generally, would not know as much about the sea as persons born in Wellington would, or in any part of New Zealand for that matter. But the deceased was, in fact, an educated man. We have been told in evidence that he was a lawyer by training, engaged as an officer in an important Court
10 in the City of Warsaw. He had been in New Zealand for ten or more years, and he had at least some acquaintance with Worser Bay, and had dived off the board quite a number of times.

But, in any event, this is my direction to you, Mr. Foreman and gentlemen, that to ascertain whether something is a concealed danger, we cannot set up a different test for the person concerned because of matters peculiar to him, simply because he happened to be a Pole and a new New Zealander. This has got to be looked at as a community thing and not with regard to some special peculiarity which some man has. If it were a child,
20 different considerations would apply, or might apply. But do not be led away as to whether they should have made provision in respect of children, because we are not concerned with a child, but with an adult, the deceased. When a person is an adult he has to be judged by the standard of the ordinary, reasonable adult in the community. Counsel for the plaintiff made a submission to you to the contrary. I do not approve of that submission to you, and in my direction is is unsound. When a new New Zealander comes to New Zealand, he is entitled to stand before the law with all the rights of a native born New Zealander,
30 but with them he must accept the same obligations as a native born New Zealander, and the test to be applied is the test that would apply to the ordinary reasonable adult in the community as a whole, predominantly New Zealand born, but with a number of citizens born in European countries who have since come here.

The point I am dealing with there is question (b), and

I do not think I need say anything in particular about question (c) because it probably stands or falls with question (b).

Now I am going to deal with the second question, and that is the one that you remember I told you about, to get your opinion on that on the basis that the City Council was not an occupier. It is linked up, of course, with those other questions, but is in a slightly different form. The question would be: "When the board was put up, was there a reasonable foreseeability of there being a danger to persons using the board that ought to be met
 10 by putting up a warning notice or something of that sort?" You must not fall into the error, Mr. Foreman and gentlemen, of judging the question from the standpoint that a fatality has occurred, and that it would not have occurred if something else had been done. We don't look at it like that - but looking at it from the time of the accident, was there negligence, was there absence of ordinary care that an ordinary reasonable man would observe, was there absence of that care in not putting up a notice or a tide gauge or something of that sort at that time and maintaining it there? You've heard all the evidence, and a good deal of it is relevant
 20 to that particular question. You remember what Mr. Hutt says, in answer to a question I myself put to him, and that is really the attitude of the City Council:-

Case,
P.50.

"Did it occur to you at any time that a warning board ought to have been put up by someone with regard to diving at low tide from this board? No, sir, because the board was erected by the Life-Saving Club who have a most intimate knowledge of the local conditions, and there have been no records of any accidents, so far
 30 as I know. I assume the Swimming Club considered the board to be safe."

So it would appear from one or two witnesses, Swimming Club witnesses, and I think the President in particular, that they considered the board to be safe, and apparently still consider it to be safe. But looking at it at that time and thinking about it as a matter of reasonable foreseeability, ought the officers of the Corporation in the exercise of reasonable care to have put up a warning board or a tide gauge or something of that sort?

Question No. 3 comes to the question of: Was the deceased negligent in a manner causing or contributing to the fatality? As I have told you, Mr. Foreman and gentlemen, everyone is required to use the care that an ordinary reasonable man would exercise for his own safety, and whatever you may think about those other questions, you might find it very difficult to resist the conclusion, and I suggest might find it very difficult to find any other conclusion, than that this man was very gravely negligent in diving in to two or three feet of water without
10 looking to see how deep the water was. You have before you all the evidence from all the witnesses, and it is very difficult to see how there could be any alternative answer to this question. It might have been some sort of temporary aberration; that sort of thing sometimes happens to people who are normally careful. The decision is yours, but you might find it difficult to see how he could be thought otherwise than negligent.

If you have answered question No. 1 in such a way that all your answers are No's, or the substance is no, and if you have answered question No. 2 no, you needn't go any further,
20 because this action is based on negligence. It is not a fact that the widow can bring an action because her husband had an accident and died; only can she bring an action if there was fault or negligence on the defendant's part. Before the plaintiff can succeed she must have an answer Yes to No. 1 or No. 2. If you answer them No, then you needn't go any further. If you think the answer to any part of them is Yes, you must go on.

Question No. 4 is the question of damages. If you come to this, will you be so good as to note the figure of the
30 special damages, £41. 5. 0. Those are the agreed special damages if the plaintiff is to recover. Because these have been agreed upon between counsel, it does not mean that the defendant admits that she is entitled to recover them. It is just that they have been agreed upon to shorten the time, so that witnesses do not have to be brought to verify the figures of the hospital and funeral accounts the widow is to recover.

Now to deal with the question of general damages, this is a claim for £6,000. Cases that are brought arising out of the death of someone are brought by persons who are wholly or partially dependent on the deceased person. The Court does not purport in an action of this sort to give any solatium for the grief that has been caused them by the death of the husband and father. What it does do is simply to provide damages for the monetary or pecuniary loss that has been suffered by the woman and the son, and in this case, to a small extent, by the mother, about 10 whom we have been told, in Poland. The law provides that the Court may award such damages as it thinks proportionate to the injury resulting from the death. The action is brought for the benefit of the widow, the son and the mother, the mother having a small claim only - we have been told that she was dependent on the deceased for parcels up to £30 or £35 a year. The widow and the son were perhaps not wholly dependent on the deceased, as the widow was herself then working and she was getting £350 a year - she is working full time now, and getting a larger sum - but they were substantially dependent on him. He was earning something 20 over £500 a year (the figure was later stated to be £583) and it would be fair to take into account the colouring of photographs £88 a year for two years; furthermore he did this work about the house; and all that has been lost from the pecuniary point of view.

What has got to be ascertained then is what pecuniary or financial benefit has been lost by the widow and the son and the old mother in Poland. You don't need to apportion the sum among them, as the law provides that the judge can afterwards apportion it, and can go into that fully; generally the figures 30 are gone into thoroughly with the Public Trustee. £6,000 is claimed and it is for you to arrive at what you consider to be a fair assessment of the pecuniary or monetary loss up to and not exceeding £6,000. It is not your duty to be niggardly, nor to be generous with other people's money. You will remember, Mr. Foreman and gentlemen, that when monies come into the house

from salaries and wages, there are all the vicissitudes and contingencies of life. He might fall ill or have another accident - quite apart from this one - that would stop his earning capacity for a while; he might die earlier than would be expected; all sorts of things can happen to a man. This is a human question, and it is for you to say what is the proper measure of damages in this case, if you come to this question, but not more than £6,000.

Having arrived at this figure, if you will put it down
10 opposite the general damages, Mr. Foreman, and add the two of them up, you will then have the total of the two, the special and general damages. Your doing that is linked up with the fifth question. This says: If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality? I think that is clear enough. It means this, that if you have found the defendant at fault either by question 1 or by question 2, and if you have found the deceased
20 at fault by question 3, then by what amount do you consider it to be fair and equitable that the sum total found in question 4 should be reduced, having regard to the share of the deceased in the unfortunate result that came about. I hope that is quite clear. The factors that have to be considered are the relative blameworthiness of the faults you find either party guilty of and the causative effect of them, and the question is, by what percentage it is just and equitable to reduce the damages because of the responsibility of the deceased. Please give the answer in so much percent, and the answer is the percentage by which the
30 total in question 4 is to be reduced.

I do not think I can usefully help you with the case further than that. I thought it as well to go on and finish this case. I am going to ask you to go now and consider your verdict, and a meal will be arranged for you if you wish it. You, Mr. Foreman, please will keep the official paper, the one on which you finally put your answers. Don't write the answers

in on any of the other copies, gentlemen, in case they come to be muddled, but let the answers be put down officially on the one which the Foreman will keep. Will you please retire and consider your verdict.

At the request of Mr. Riddiford, His Honour added:

It is not correct that the board was in the same state at the time of the fatality as it had been for thirty years. A new spring-board was erected in 1941 and the Navy took over the portion of the beach which included the spring-board in 1942, during which time the public could not use the spring-board, and they did not have the use of the board again until 1946. The new board was placed on a concrete slab raising it a further 18" above the water. The board, at the height it was raised above the water at the time of the fatality, had not been there for more than nine years.

VERDICT OF JURYIssues and Answers:

- 1 (a) Was the defendant Corporation occupier of the premises comprising the spring-board? ANSWER: Yes
- 1 (b) If yes, did the spring-board constitute a concealed danger at low tide? ANSWER: No
- 1 (c) If yes, ought the defendant to have maintained a warning notice board or tide gauge? ANSWER:
2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge? ANSWER: Yes
3. Was the deceased negligent in a manner causing or contributing to the fatality? ANSWER: Yes
4. Damages (total) Special £41. 5. 0
General £5,250 TOTAL: £5,291.5. 0
5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that

5.
(Contd.)

the total damages be reduced
having regard to the share of
the deceased in the respons-
ibility for the fatality?

ANSWER: 80%

Rider:

We the jury are concerned at the lack of interest shown by the Corporation and the Swimming Club in the conditions existing at Worser Bay. The Swimming Club in particular have been aware of the conditions existing in the vicinity of the diving board for a number of years and no effort had been made by either party to warn the public of the danger of diving from the board at low water.

L.R. Buchanan

Foreman.

IN THE SUPREME COURT OF NEW ZEALAND)
WELLINGTON DISTRICT)
WELLINGTON REGISTRY) No. A218/54

BETWEEN EWA PERKOWSKI of Wellington
 Widow of ANTONI WITOLD PER-
KOWSKI deceased

Plaintiff

AND THE MAYOR COUNCILLORS AND
CITIZENS OF THE CITY OF
WELLINGTON a body corporate
 duly constituted under the
 Municipal Corporations Act 1933

Defendant

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TAKE NOTICE that Counsel for the Defendant

WILL MOVE this Honourable Court on Thursday the 15th day of
 September 1955 at 10 o'clock in the forenoon or so soon thereafter
 as Counsel can be heard FOR AN ORDER that upon the answers
 returned by the Jury to the issues submitted to them at the trial
 of this action on the 18th day of August 1955 judgment be entered

20 for the Defendant with costs UPON THE GROUNDS:

- (a) THAT the answer of the Jury to issue 1 (b) determines
 the action in favour of the Defendant;
- (b) THAT in the circumstances there is no liability at law
 on the Defendant in respect of the matters to which issue
 2 relates;
- (c) THAT there is insufficient evidence to support the
 answer of the Jury to issue 2;
- (d) THAT the answer of the Jury to issue 2 is without effect
 as it is one which the Jury was precluded from finding
 30 in view of the answers given to issues 1 (a) and (b).

Dated at Wellington this 30th day of August 1955.

A.B. THOMSON

Counsel for Defendant.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN: EWA PERKOWSKI

Plaintiff

A N D: THE MAYOR COUNCILLORS AND
CITIZENS OF THE CITY OF
WELLINGTON

Defendant

10 Hearing: August 17, 18, 1955

 Counsel: D.J. Riddiford for Plaintiff
 A.B. Thomson for Defendant

 2nd Hearing: September 15, 1955

 Counsel: D.J. Riddiford & Cooke for Plaintiff
 A.B. Thomson for Defendant

 Judgment: November 17, 1955.

JUDGMENT OF HUTCHISON J.

20 This is a claim under the Deaths by Accident Compensation
Act 1952 in respect of the death of the husband of the plaintiff,
who, on the 9th January 1954, suffered fatal injuries when he
dived at low tide from a diving board into shallow water at
Worser Bay. The action was heard before a jury on the 17th
and 18th August last.

 The land immediately above high water mark at the part
of Worser Bay with which we are concerned is vested in the
Corporation of the City of Wellington as a pleasure ground.
The land so vested in the Corporation includes five rocks off-
shore so far as they are above high water mark.

30 Off-shore there is an erection which, taking it from
the shore end, consists of a concrete duck-walk to one of the
rocks so vested in the defendant Corporation, which was
referred to in the action as Rock No. 5, then a wooden duck-

walk from Rock No. 5 to a concrete platform, which is supported on concrete piers, and on which at the seaward end was, at the time of the fatal accident, the diving board from which the deceased dived. The erection as a whole, except for the spring-board and a concrete block on which it rested, was erected by the Worser Bay Amateur Swimming and Life-Saving Club, the concrete piers being made by pouring concrete into old circular tanks. The diving board was erected by the Wellington City Corporation years before the fatal accident, probably in 1941, at the request
10 of the Swimming and Life-Saving Club, in replacement for a board which had been erected there earlier by the Club but which had been broken. It rested on a concrete block on the platform. It was not proved who put the concrete block there; it was suggested that it may have been done by the Navy, who, for defence purposes, were in possession of the area from 1942 to 1945; if not, it may have been done by the Wellington City Corporation when the board was erected. The concrete piers that support the seaward end of this structure stand on the bed of the harbour, which, it was common ground, is vested in the Marine Department.

20 While the way in which liability was sought to be placed upon the Corporation did not appear very clearly from the statement of claim, it became apparent as the hearing proceeded. The case for the plaintiff was put primarily on the basis that, having regard to the facts, inter alia, that the Corporation owns, as a pleasure ground, the land above high water mark and the five rocks, one of which supports the landward end of the seaward duck-walk, and that it erected the diving board, that the Corporation was the occupier of the "premises", and that the diving board, which it was dangerous to use at low tide on account of the
30 shallowness of the water, was a concealed danger known to the Corporation, and that it should, by the erection of a warning board or a tide gauge, have given notice to persons proposing to use the diving board of the concealed danger.

Alternatively, when the matter went to the jury, the case for the plaintiff was put on the basis that, if the Corporation

were not an occupier of the premises including the diving board, it was, simply because it erected the diving board, under a duty of care to persons who might use it, and that it was negligent in not erecting and maintaining a warning board or a tide gauge. It was I who suggested, when the issues were being settled, that there might be some liability on the Corporation, apart from occupancy, under such a general duty of care as is laid down in Donoghue v. Stevenson (1932) A.C. 562. It was agreed by counsel with myself that an issue should be put as to negligence on the part of the Corporation apart from occupancy, but on the basis that, if there was a finding of negligence on that issue, it would be left to me to rule whether there was, apart from occupancy, any duty of care upon the Corporation relevant to the fatality that occurred. It was agreed by counsel that, in connection with the question left to me, I should have the right to draw any inferences of fact.

The issues as settled and the answers of the jury were as follows:-

- 1 (a) Was the defendant Corporation occupier of the premises comprising the spring-board? ANSWER: Yes
- 1 (b) If yes, did the spring-board constitute a concealed danger at low tide? ANSWER: No
- 1 (c) If yes, ought the defendant to have maintained a warning notice board or tide gauge? ANSWER:
2. Was the defendant negligent in a manner causing or contributing to the fatality in not maintaining a warning notice board or tide gauge? ANSWER: Yes

3. Was the deceased negligent in a manner causing or contributing to the fatality?

ANSWER: Yes

4. Damages (total) Special £41.5.0
General £5,250

TOTAL: £5,291. 5. 0

5. If both the defendant and the deceased were at fault in a manner contributing to the fatality, by what percentage is it just and equitable that the total damages be reduced having regard to the share of the deceased in the responsibility for the fatality?

ANSWER: 80%

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Issue (1) related to the primary way in which the case was put for the plaintiff. When the issues were being settled, I informed counsel that I would direct that the duty of the Corporation as an occupier would be the duty resting upon it vis-a-vis a licensee. No exception was taken by counsel to that, and my direction on that point in the summing-up is not questioned. It will be noticed that there is no issue put in question (1) as to knowledge by the Corporation of the concealed danger alleged. Counsel for the plaintiff referred me to Hawkins v. Coulsdon and Purley Urban District Council (1954) 1 A.E.R. 97, and counsel for the Corporation agreed that the Corporation had physical knowledge of the position, and, that if the jury should hold that there was a concealed danger, the Corporation could not say that it had no knowledge of such a concealed danger, and accordingly that no issue as to the Corporation's knowledge of such a concealed danger need be put.

Issue (2) related to the secondary way in which the case was put. In summing up, I explained to the jury that an affirmative answer to this issue would not necessarily mean that

the plaintiff would recover, but would leave me to deal with the question as to whether there was, if the defendant Corporation was not the occupier, any duty of care relevant to the present case resting on it.

When the jury's verdict was given, Mr. Riddiford moved for judgment for the plaintiff for £1,058. 5. 0, being the amount arrived at by reducing the total damages found by 80%, and I adjourned the case for further consideration. Mr. Thomson later filed a motion for judgment for the defendant. The two motions are now before me.

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It is to be seen that by virtue of the answer to question 1(b), the deceased having been a licensee only, the plaintiff fails on the primary presentation of her case as based on occupancy of the premises by the Corporation - See Salmond on Torts 11th Ed. p. 570-571.

The plaintiff can succeed in her action only on the basis that there was, apart from any question of occupancy, a duty of care on the Corporation to erect and maintain a warning board or tide gauge. I explained to the jury in my summing up, mentioning this several times, that Issue No. 2 was put to them on the basis that the Corporation was not the occupier; though I did not expressly tell them that they need not answer Issue No. 2 if they found in answer to Issue No. 1 that the Corporation was the occupier, and it would probably have been better, in the way that the case was presented to them, if I had expressly told them that. However that may be, it was conceded on behalf of the plaintiff on the hearing of the motions, that the principle that I for convenience refer to as the Donoghue v. Stevenson principle does not apply in the realm of the duty of an occupier of premises.

The verdict on Issue No. 1(a) finds that the Corporation was the occupier of the premises, and that therefore presents a major difficulty in the way of plaintiff's counsel in their submission that she is entitled to judgment on the answer to Issue No. 2. They endeavoured to meet this difficulty by a number of submissions, all of which are inconsistent with the way in

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which the case was presented at the hearing.

Mr. Riddiford submitted that, when the jury answered the question 1(a) in the affirmative, it could have meant only that the defendant Corporation had control of the spring-board only, that the spring-board itself was too small to be "premises" and that the principle that should be applied to the case is the principle applying in cases where chattels have been erected on land occupied by someone else. The words used in the Issue "premises comprising the spring-board" were used simply as a concise
 10 form of words, and I am sure that it cannot have been thought by anyone that they confined the question to the spring-board itself as distinct from the spring-board and other parts of the structure. Mr. Riddiford explained that whenever, in addressing the jury, he referred to the "premises", the "premises" that he was referring to were the diving board and the access way based on Rock No. 5, and that he abstained from saying that the concrete platform to which the access way led and on which the diving board was erected was occupied by the Corporation. I do not think that I myself appreciated at any stage that he was excluding the concrete
 20 platform from the "premises" of which he contended that the Corporation was an occupier, and I do not think there is any reason why I should have appreciated it. The amended statement of claim, after saying that the concrete platform, its concrete supports and the diving board were the property of the Marine Department, that the access way was mainly, if not entirely, the property of the Corporation, and that the diving board was erected by the Corporation, said, paragraph 7:

Case, "The said platform, the said access way and
 P. 3. the said diving board constituted in substance
 30 and in fact a single structure."

So they did. Mr. Riddiford opened his case to the jury by referring to the obligation of the occupier of the premises, who agrees to persons going to those premises, to warn such persons of any concealed danger, and made special reference to the duty of a local body that provides parks and playgrounds. I accept

at once, of course, his explanation that I have mentioned; but, even on that explanation, it was not of the spring-board only that the jury held that the Corporation was occupier, but of the spring-board and the access way based on Rock No. 5; and further, I am unable to accept a view that any distinction can be drawn to the effect that the Corporation was the occupier of that access way and the diving board, but not the occupier of the platform to which the access way led and on which the diving board was erected. I am, therefore, of the opinion that the answer of the jury to

10 Issue 1(a) cannot be construed as a finding that the defendant Corporation had control of, or was occupier of, the diving board only. I agree with Mr. Thomson that the Issue was directed to obtaining the verdict of the jury as to whether the defendant Corporation was the occupier of the structure, or at least part of the structure, of which the diving board was the important feature for the purposes of this case, and that the answer of the jury must be so construed.

Mr. Cooke submitted that neither the duty of an occupier nor the duty in respect of chattels erected on land occupied

20 by someone else came under consideration. He submitted that simply by erecting the diving board the Corporation created a situation in which it owed a duty of care to members of the public using the board. This is the very question that it was visualised might require consideration and that was to be reserved for my decision, if there should be a finding that the defendant Corporation was not the occupier of the premises. The difficulty faced Mr. Cooke, however, as it faced Mr. Riddiford, that the verdict of the jury is that the Corporation was the occupier of "the premises"; and Mr. Cooke conceded that, if it

30 is possible in law for the Corporation to be occupier of "the premises", then that verdict must stand. Taking "the premises" as being the spring-board only, however, he contended that the spring-board was not such a thing as was capable of occupancy. But that verdict must, in my opinion, be taken, as I have already said, as referring not to the spring-board only, and,

so taking it, I have no doubt that it was possible in law for the Corporation to be occupier of the premises to which the verdict referred. Mr. Cooke submitted that the liability of an occupier is confined to cases where the injury is suffered on the premises; the deceased, he said, was killed not on the premises but when he hit his head on the bottom of the sea, that is, off the premises. He submitted that the liability of an occupier is confined to injuries caused by the defective state of the premises themselves. In a subsequent memorandum, he referred me to Lewys v. Burnett and Dunbar and Anor. (1945) 2 A.E.R. 555. He suggested that it was an important factor in that case, as affecting liability on the part of the first two defendants, that the person killed did not come by his death because of any defect in the lorry in which he was being conveyed. This relates to his main point, but it has, no doubt, particular reference to the submission to which I have just referred. I can, however, find nothing in the judgment to justify the suggestion that it was an important factor in the case that the death of the deceased was not because of any defect in the lorry; and, indeed, I think that the liability of the first two defendants in that case depended on an application of a different principle to that applicable between the occupier of premises and a licensee; it is said in Salmon on Torts 11th Ed., p. 548:-

".... the driver of a vehicle owes his passengers the same duty to take reasonable care for their safety whether they are gratuitous or fare-paying, while the duty of an occupier of premises is elaborately graduated according to the character of the entrant."

Returning to the two submissions which I stated before referring to the case mentioned in the memorandum, I do not think it necessary to deal with either of them. They would have been relevant if it were desired to absolve the Corporation from a liability to which it had been held subject as an occupier. Obviously enough, they were not put forward for any such purpose as that. They were put forward, no doubt, for the purpose of destroying the effect of the finding that the Corporation

was the occupier; but that is a finding of fact, and I do not think that such a finding can be disposed of obliquely by means of such submissions. Inferentially, they criticise the way the case was presented for the plaintiff at the trial, but, even if criticism of that were justified, to which I make some reference later, I do not think that that helps the plaintiff at this stage.

As I see the case, the jury found, in accordance with the submission made to it for the plaintiff, that the defendant Corporation was an occupier of some part, at any rate, of the structure of which the spring-board was, for the purposes of this case, the important part. It found, contrary to the submission for the plaintiff, that the spring-board did not constitute a concealed danger. The deceased having been a licensee only, that finding concludes the case against the plaintiff, insofar as the case is based on the duty of the Corporation as an occupier. The second issue related only to the position as it would be if the Corporation were not an occupier, and was not intended by the parties to have any application if the defendant Corporation were an occupier. Even if, contrary to that view, it could be held to relate to the position of the Corporation as an occupier, the concession made by counsel for the plaintiff that the principle laid down in Donoghue v. Stevenson (supra) does not prevail in the realm of an occupier's duty would conclude the case against the plaintiff.

As that concession is so important for the purpose of this case, I think that I should say that, in my opinion, it was properly made. In Robert Addie & Sons (Collieries) Ltd. v. Dumbreck (1929) A.C. 358, where the appellant was occupier of the premises and the respondent was a trespasser, there is no hint of any other principle being applied than the recognised principle applicable between an occupier and a trespasser, for which see the opinion of Lord Hailsham, Lord Chancellor, at page 365. In Excelsior Wire Rope Company Ltd. v. Callan (1930) A.C. 405, where a wider basis of liability was adopted by the House, the appellant was not an occupier - see the speech of Lord Atkin at

page 412. In Mourton v. Poulter (1930) 2 K.B. 183, again the respondent was not an occupier. Turning to the more recent cases, in Buckland v. Guildford Gas Light & Coke Company Ltd. (1949) 1 K.B. 410 in which the defendant was held liable under the principle of Donoghue v. Stevenson (supra), it was not the occupier of the land. Morris J., as he then was, stated, p. 421:-

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"But it was forcibly contended that inasmuch as the occupier of land is not, save on the basis to which I have just referred, liable if a trespassing child meets with injury, the liability of someone in the position of the defendants ought to be no greater. In my judgment, this does not necessarily follow. The liability, if any, of an occupier of land arises out of the fact of his occupancy and of some action of his while occupying. But the liability, if any, of the defendants is on a somewhat different basis."

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In London Graving Dock Company Ltd. v. Horton (1951) A.C. 737, an attempt was made to invoke the principle of Donoghue v. Stevenson in a case in which the parties were occupier and invitee. That attempt appears to have found some favour in the Court of Appeal with Singleton L.J. and Jenkins L.J. - see the report of the proceedings in the Court of Appeal at (1950) 1 A.E.R. 180. In the House of Lords, however, all the speeches disposed quite shortly, for various reasons, of the argument based on Donoghue v. Stevenson. The statement nearest in point for present purposes is that of Lord MacDermott, who said:-

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"It is no doubt true that, on occasion, responsibility at law may be imposed concurrently by different rules, as, for example, where the claim sounds in both negligence and nuisance. But I am not disposed to think that the liability in tort of an invitor to his invitee comes from more than one quarter. I think that where there is such liability it must be found in the doctrine of Indermaur v. Dames."

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In Davis v. St. Mary's Demolition & Excavation Company Ltd. (1954) 1 A.E.R. 578, in which the rule of Donoghue v. Stevenson was applied, the defendant was not the occupier of the land. Ormerod J. said:-

".... I have to ask myself: Are the defendants in the same position vis-a-vis the plaintiff as they would be if they were the occupiers of

the land in question? Do they owe no other duty to the plaintiff than the occupier of the land would owe to a trespasser, or are they, in the circumstances of the present case, in such a position in relation to the plaintiff that, in spite of the fact that he was a trespasser, they owe to him a duty to take care so far as this building was concerned?"

The point came before the Chief Justice in Napier v. Ryan and Anor.

10 (1954) N.Z.L.R. 1234. His Honour said, p. 1243:-

"It is a matter for some concern that apparently the standard of care required of an occupier is different from, and perhaps less than, the standard of care required of a person who is not an occupier. That differing standards do exist in English law is pointed out in an interesting series of articles in the Law Quarterly Review (69 L.Q.R. 182 and 359; and 70 L.Q.R. 33). The probable reasons for the two standards are pointed out in those articles"

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Finally on this point, it is not suggested in the articles in the Law Quarterly Review referred to by the Chief Justice, published in and after April 1953, that there has been any impact on the relationship between occupiers on the one hand and invitees, licensees and trespassers on the other hand, of the principle laid down in Donoghue v. Stevenson, and in the Third Report of the Law Reform Committee to the Lord Chancellor, dealing with occupiers' liability to invitees, licensees and trespassers, dated October 1954, the law is stated as it has for long been generally understood and without any reference to that principle. As I have already

30 said, I am of the opinion that counsel's concession that I have referred to was rightly made. (Since writing the foregoing I have seen the article in the part of the New Zealand Law Journal just issued dated 1st November 1955, the article appearing at p. 305 and following pages. This states the law to be as counsel in this case admitted it to be, and, in the view that I have just expressed, properly admitted it to be. The case of Creed v. John McGeoch & Sons Ltd. (1955) 3 A.E.R. 123 referred to in the article is a further and very recent authority to that effect.)

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Mr. Riddiford submitted that, at the worst for the plaintiff, his motion for judgment should be treated as a motion for a new trial, and that a new trial should be granted on the

ground that the answers to Issues 1(b) and 2 are contradictory. Assuming that it is permissible so to treat his motion, which I do not decide, I do not think that these two answers are contradictory. The answers are made in relation to two different aspects of the case, and, even if they were made in relation to the same aspect of the case, I do not think that there is a contradiction in a jury's finding a defendant to be negligent, and at the same time finding that a danger caused by the negligence was not a concealed danger.

10 I think that I should add this. Mr. Riddiford was disposed, I think, on the argument of the motions, to feel that, if he had presented the case differently, the plaintiff might have had more success. I doubt very much whether that would have been so. The plaintiff's case was put on the basis that the defendant Corporation was an occupier, and that the spring-board set up over shallow water at low tide constituted a trap or concealed danger. If the plaintiff had succeeded in establishing those two points, she would have brought her case substantially into parallel with Simmons v. Mayor etc. of Huntingdon (1936) 1 A.E.R. 596, and, subject to a consideration
20 of the two points that I have referred to as being now raised by Mr. Cooke but not decided by myself, would have succeeded. In the result, she established the occupancy, but failed to establish the hidden danger or trap. If the case had been put on the basis simply of a general duty of care, for the purpose of which it would have been necessary to deny any occupancy by the Corporation, it might have been, as it seems to me, still more difficult to have established any liability on the Corporation. There was no question of defective workmanship about the erection of the spring-
30 board. It was erected at the request of the Worser Bay Amateur Swimming and Life-Saving Club, and the Corporation might well have been justified in taking the view that, if there were any danger, the Club would take any necessary precautions. Assuming, as one would have to, that the Corporation was not the occupier of the structure, either there would have been no occupier of it, or that the Club would have been the occupier of it; and the latter

would, I think, have been the more likely view. I think that it might have been very difficult for the plaintiff to establish that there was a duty upon the Corporation to maintain a warning board throughout all the years that have gone by since it erected the spring-board when, as would probably under those circumstances be held to be the case, the structure was in the occupation of another body well qualified to deal with such a matter.

There will be judgment for the defendant. Leave is reserved to the defendant to apply for costs.

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Solicitors: Beere and Riddiford, Wellington,
for Plaintiff.

City Solicitor, Wellington,
for Defendant.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
(WELLINGTON REGISTRY)

No. A218/54

BETWEEN EWA PERKOWSKI of Wellington,
Widow of ANTONI WITOLD PERKOWSKI
deceased

Plaintiff

AND THE MAYOR COUNCILLORS AND CITIZENS
OF THE CITY OF WELLINGTON a body
corporate duly constituted under
the Municipal Corporations Act 1933

Defendant

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Thursday the 17th day of November 1955.

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THIS ACTION coming on for trial on the 17th and 18th days of August 1955 before the Honourable Mr. Justice Hutchison and a Common Jury of twelve persons and AFTER HEARING Mr. Riddiford of Counsel for the Plaintiff and Mr. A.B. Thomson of Counsel for the Defendant and the evidence then adduced on behalf of the Plaintiff and the Defendant respectively AND the jury having found for the Plaintiff on the issues AND both the Plaintiff and the Defendant having moved for judgment AND UPON READING the Notice of Motion for Judgment for the Defendant AND the said Motions having come on for hearing on the 15th day of September 1955 AND after hearing Counsel for the said parties IT IS THIS DAY ADJUDGED that the Plaintiff's motion for judgment be dismissed and that judgment be entered for the Defendant AND IT IS ORDERED that leave be and is hereby reserved to the Defendant to apply for costs.

By the Court

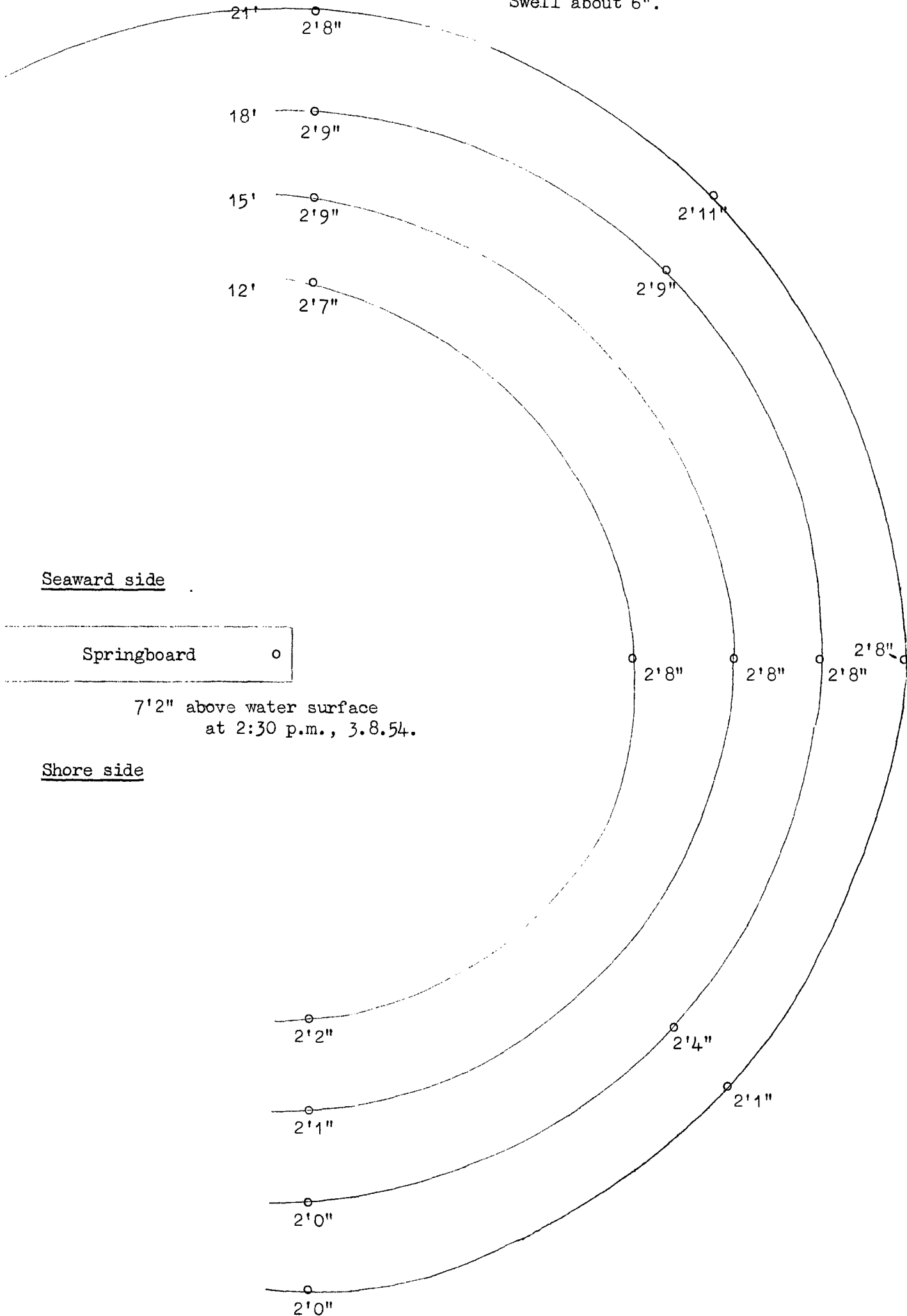
H.J. WORTHINGTON

Deputy-Registrar.

L.S.

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Contours of water depths at 12, 15, 18 and 21 feet from end of spring-board, measured between 2:15 p.m. and 2:30 p.m. on 3.8.54. Swell about 6".



In the Court
of Appeal

JUDGMENT OF COURT OF APPEAL OF NEW ZEALAND

IN THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

EWA PERKOWSKI of Wellington,
Widow of ANTONI WITOLD PERKOWSKI
deceased

Plaintiff

AND

THE MAYOR COUNCILLORS AND CITIZENS
OF THE CITY OF WELLINGTON a body
corporate duly constituted under the
Municipal Corporations Act 1933

Defendant

Before the Right Honourable the Chief Justice.

The Honourable Mr. Justice Stanton.

The Honourable Mr. Justice Adams.

Friday, the 12th day of October, 1956.

THIS APPEAL coming on for hearing on the 23rd and 24th days of
April, 1956, UPON HEARING Mr. Riddiford and Mr. Cooke of
counsel for the Appellant, and the hearing then being adjourned
sine die, and Mr. Thomson of counsel for the Respondent/^{subsequently}not
being called upon IT IS ADJUDGED that the appeal herein be
dismissed.

By the Court,

V.J. HITCHCOCK

Deputy Registrar.

L.S.

AT THE COURT AT GOODWOOD HOUSE

The 31st day of July, 1957

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRESIDENT
SIR MICHAEL ADEANE

MR. MAUDLING
SIR HARRY HYLTON-FOSTER

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 30th day of July 1957 in the words following, viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Ewa Perkowski in the matter of an Appeal from the Court of Appeal of New Zealand between the Petitioner and the Mayor Councillors and Citizens of the City of Wellington Respondents setting forth (amongst other matters) that your Petitioner desires special leave to appeal in forma pauperis to Your Majesty in Council from a Judgment dated 12th October 1956 of the Court of Appeal of New Zealand dismissing an Appeal from a Judgment dated 17th November 1955 of the Supreme Court of New Zealand dismissing an action in which Your Petitioner claimed damages for the death of her husband caused when his head struck the bed of the sea in Worser Bay Wellington after diving from a springboard erected by the Respondents: that the Petitioner was entitled as of right to appeal to Your Majesty in Council and on the 22nd March 1957 the said Court of Appeal granted her conditional leave to appeal one of the conditions being that the Petitioner should give security in the sum of £100 for the due prosecution of the Appeal but the Petitioner being impecunious has not been able to give such security and is not able to prosecute her Appeal unless given leave to do so in forma pauperis." And humbly praying Your Majesty in Council to grant special leave to appeal in forma pauperis from the Judgment of the Court of Appeal of New Zealand dated the 12th October 1956 and to make such further or other Order as may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof no one appearing at the Bar on behalf of the Respondents Their Lordships do this day agree

humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal in forma pauperis against the Judgment of the Court of Appeal of New Zealand dated the 12th day of October 1956:

"And Their Lordships do further report to Your Majesty that the proper officer of the said Court of Appeal ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of New Zealand and its Dependencies for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

No. 9 of 1958
IN THE PRIVY COUNCIL
ON APPEAL
FROM THE COURT OF APPEAL OF NEW
ZEALAND

B E T W E E N

EWA PERKOWSKI Appellant

- and -

THE MAYOR COUNCILLORS AND
CITIZENS OF THE CITY OF
WELLINGTON Respondent

RECORD OF PROCEEDINGS

ARNOLD FOOKS CHADWICK & CO.,
15, Bolton Street,
London, W.1.

Solicitors for the Appellant

WRAY SMITH & CO.,
3/4, Adelaide Street,
London, W.C.2.

Solicitors for the Respondent